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ARTICLE

# PREJUDICE-BASED RIGHTS IN CRIMINAL PROCEDURE

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*This Article critically examines a cluster of rules that use the concept of* prejudice *to restrict the scope of criminal defendants' procedural rights, forming what I call* prejudice-based rights. *I focus, in particular, on* outcome-centric prejudice-based rights*—rights that apply only when failing to apply them might cause prejudice by affecting the outcome of the case. Two of criminal defendants' most important rights fit this description: the right, originating in* Brady v. Maryland, *to obtain favorable, "material" evidence within the government's knowledge, and the right to effective assistance of counsel. Since prejudice (or equivalently,* materiality*) is an element of these rights, no constitutional violation occurs when the government suppresses favorable evidence, or defense counsel furnishes ineffective assistance, unless there is a reasonable probability that the outcome was affected thereby.*

*Outcome-centric, right-restricting prejudice rules serve understandable functions: they enable courts to preserve finality by rationing appellate and postconviction relief. To the extent this is their aim, however, such rules sweep far too broadly. For they narrow the scope of defendants' rights not only in appellate and postconviction proceedings, as intended, but also at the trial court level, where finality is not at stake. The overbreadth of these rules is deeply problematic. For one thing, efforts to predict outcome-determinative prejudice ex ante usually amount to little more than guesswork, since relevant information is in short supply during the early stages of a prosecution. And in any event, procedural fairness is essential in every criminal case—not just when fair processes are needed to prevent unfair outcomes. Outcome-centric prejudice-based rights are at odds with that premise, because the entitlements they bestow vanish once a trial judge, prosecutor, or police officer determines that the outcome is a foregone conclusion.*

*After fleshing out these concerns, I propose a two-pronged strategy for reforming* Brady, *effective assistance of counsel, and potentially other outcome-centric prejudice-based rights. First, courts should remove prejudice from the definition of these rights, treating prejudice instead as a remedial question—one that would come into play when a convicted defendant seeks relief from an appellate or postconviction court, but generally not in other settings. Second, courts should dismantle the outcome-centric conception of prejudice embedded in these doctrines and replace it with a non-outcome-centric framework that I call* contextual harmless error review. *These reforms would greatly improve the fairness of the criminal process, and would do so without unduly disturbing the finality of trial court judgments.*

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## INTRODUCTION

This Article critically examines a cluster of rules that use the concept of *prejudice* to restrict the scope of criminal defendants' procedural rights, forming what I call *prejudice-based rights*.[1] I focus, in particular, on *outcome-centric prejudice-based rights*—rights that apply only when failing to apply them might cause prejudice by affecting the outcome of the case. Two of criminal procedure's most important rights fit this description.[2] One of these rights, originating in *Brady v. Maryland*,[3] entitles the defendant to obtain favorable, "material" evidence within the government's knowledge, where *material* denotes "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[4] The second is the right to effective assistance of counsel, which protects defendants against unreasonable acts or omissions by counsel if, but only if, those errors

1 *See generally infra* Section I.A (defining key terms).

2 There are also a number of other outcome-centric prejudice-based rights in constitutional criminal procedure, beyond the two mentioned here, which I will discuss as the Article progresses. *See infra* subsection I.B.3.

3 373 U.S. 83 (1963).

4 United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *see also infra* subsection I.B.1.

are prejudicial, meaning a "reasonable probability" that counsel's deficient performance swayed the outcome.[5]

Outcome-centric, right-restricting prejudice rules serve understandable functions. Among other things, they enable courts to preserve the finality of criminal judgments by foreclosing appellate and postconviction relief in cases where the outcome is not on the line.[6] To the extent this is their aim, however, such rules sweep far too broadly.[7] For they narrow the scope of defendants' rights not only in appellate and postconviction proceedings, as intended, but also at the trial court level,[8] where finality is not at stake and where judges and other actors must decide in the first instance what rights mean and how to enforce them.[9]

The overbreadth of these rules is deeply problematic. For one thing, efforts to predict outcome-determinative prejudice ex ante usually amount to little more than guesswork, since at that juncture, relevant information is in short supply regarding each side's theory of the case, the evidence, and other factors that often contribute to case outcomes. These informational gaps, in conjunction with other epistemic obstacles discussed later, make it all but impossible for judges and, especially, prosecutors and police officers to reliably administer outcome-centric prejudice-based rights during the early stages of a criminal prosecution.[10] And in any event, procedural fairness is essential in every criminal case, not just when fair processes are needed to prevent unfair outcomes. Outcome-centric prejudice-based rights are at odds with that premise, because the entitlements they bestow vanish once a trial judge, prosecutor, or police officer decides that the outcome is a foregone conclusion.[11] It is perhaps no coincidence, then, that *Brady* and the right to effective assistance of counsel are widely regarded as paper tigers—grand symbols of our collective commitment to fairness, to be sure, but symbols that have utterly failed in practice to make good on their respective promises.[12]

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5 Strickland v. Washington, 466 U.S. 668, 694 (1984); *see also infra* subsection I.B.2.

6 *See infra* Section I.C.

7 As we shall see, courts sometimes have multiple reasons—not just safeguarding finality—for choosing outcome-centric, right-restricting prejudice rules. But finality is often a key factor, especially for *Brady* and effective assistance of counsel. *See infra* Section I.C.

8 When I refer to decisionmaking at the *trial court level* in this Article, I mean to include all aspects of the criminal process that precede entry of judgment, ranging from plea negotiations and discovery to trial and sentencing.

9 *See infra* Section II.A.

10 *See infra* subsection II.B.1.

11 *See infra* subsection II.B.2.

12 As to *Brady*, see, for example, Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 728 (2006) ("[M]ore than any other rule of criminal procedure, the *Brady* rule has been the most fertile and widespread source of misconduct by prosecutors; and, more than any other rule of constitutional criminal procedure, has exposed the deficiencies in the truth-serving function of the criminal trial."). As to effective assistance of counsel, see, for example, Paul Butler, *Poor People*

The array of problems that outcome-centric, right-restricting prejudice rules cause at the trial court level are not yet well understood.[13] This Article surfaces those problems, then proposes a two-pronged strategy for reforming *Brady*, effective assistance of counsel, and potentially other outcome-centric prejudice-based rights.[14] First, courts should remove prejudice from the definition of these rights, treating prejudice instead as a remedial question—one that would come into play when a convicted defendant seeks relief from an appellate or postconviction court, but generally not in other settings.[15] Second, courts should dismantle the outcome-centric conception of prejudice embedded in these doctrines, and replace it with a non-outcome-centric framework that I call *contextual harmless error review*.[16] These reforms would greatly improve the fairness of the criminal process, and would do so without unduly disturbing the finality of trial court judgments.

The Article has three Parts. Part I defines core concepts such as prejudice and prejudice-based rights, and then introduces the various doctrinal areas in

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*Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2190-91 (2013) (arguing that the right to state-appointed counsel "has been a spectacular failure" partly because "[i]ndigent defense has been grossly underfunded, where it is provided at all").

13 In fact, much of the existing academic literature suggests there is little or no practical difference between right-restricting prejudice rules, on one hand, and harmless error rules, which limit access to appellate and postconviction relief but generally do not apply at the trial court level. *See infra* notes 110–11 and accompanying text. One scholar recently argued, for instance, that using prejudice to define rights is "functionally indistinguishable" from subjecting rights to harmless error review on appeal. Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2162 (2018); *see also id.* at 2158-64 (contending that harmless error rules are best understood as relating to rights, not remedies). This Article challenges that view. *See infra* Part II. While it certainly is true that outcome-centric, right-restricting prejudice rules function similarly to harmless error rules when administered by appellate and postconviction courts, right-restricting prejudice rules (unlike harmless error rules) are also routinely applied during earlier stages of the criminal process by trial judges and, in some instances, by prosecutors and police officers. One core aim of this Article is to show why this difference matters and, relatedly, why we should generally prefer some version of harmless error review over outcome-centric, right-restricting prejudice rules.

14 I say *potentially* because *Brady* and effective assistance of counsel serve as my principal case studies throughout the Article. It could be that there are stronger reasons for maintaining the status quo in other doctrinal domains than there are for *Brady* and effective assistance. Even so, the larger themes the Article explores—regarding the difficulty of measuring outcome-determinative prejudice (especially ex ante) and the importance of non-truth-furthering interests in criminal procedure—have relevance far beyond the confines of *Brady* and effective assistance jurisprudence.

15 *See infra* Section III.A.

16 *See infra* Section III.B. The concept of contextual harmless error review is not entirely new: it is an idea I previously developed, for use in connection with errors involving *non-prejudice-based rights*, in a recent article. *See* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791, 1791 (2017) (proposing a "contextual approach to harmless error review" that "would assess harm in relation to the constellation of interests served by the particular procedural rule that was infringed and would not, as under existing law, automatically confine the harmless error inquiry to estimating the error's effect on the outcome"). That article did not consider whether a similar framework should be used in connection with prejudice-based rights like *Brady* and effective assistance of counsel. I take up that question in Section III.B of this Article.

which courts have woven outcome-determinative prejudice into the fabric of criminal defendants' constitutional rights. Part II states my critique of outcome-centric, right-restricting prejudice rules. And Part III advances my proposal for reform.

## I. THE LAW OF PREJUDICE-BASED RIGHTS

This Part introduces the law of prejudice-based rights. I begin by laying the definitional groundwork for what follows. To summarize, (1) *prejudice* refers here to harm, not discrimination; (2) *outcome-centric* prejudice rules are rules that treat an adverse outcome as the only recognizable kind of harm; and (3) *prejudice-based rights* are rights that apply only when failing to apply them might cause prejudice. The critique developed later in this Article is targeted primarily at *outcome-centric prejudice-based rights*. After a preliminary exposition of these concepts, I then discuss *Brady* and the right to effective assistance of counsel—which are my principal case studies throughout the Article—as well as other areas of criminal procedure in which the Supreme Court has incorporated outcome-centric prejudice requirements into the definition of constitutional rights. And finally, I examine the reasons the Court has articulated to justify outcome-centric, right-restricting prejudice rules, focusing on the Court's suggestion that such rules are needed to strike a balance between procedural fairness to the defendant and the finality of criminal judgments.

### A. Prejudice *and* Prejudice-Based Rights *Defined*

Judge Learned Hand once wrote that "[o]ur procedure has been always haunted by the ghost of the innocent man convicted," which impels judges to be overly solicitous of criminal defendants and their rights.[17] But criminal procedure is also haunted by a second fear that pushes law in the opposite direction: a fear that "the exaltation of [procedural] technicalities" will set the guilty free.[18] Courts have addressed this concern in a variety of ways. One prominent strategy—not coincidentally, a strategy that Judge Hand deployed aggressively—involves restricting defendants' prerogative to complain about *nonprejudicial* events in the criminal process.[19]

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17 United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

18 *E.g.*, John H. Wigmore, *New Trials for Erroneous Rulings upon Evidence; A Practical Problem for American Justice*, 3 COLUM. L. REV. 433, 444-45 (1903) ("[T]he constitutional safeguards of procedure and evidence are invoked with such fatuous frequency and such misplaced technicality that their respect is lowered and their true purposes are defeated.").

19 *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 457 (2d ed. 2010) (discussing a "recurrent dispute between [Judge Jerome] Frank and all the other [Second Circuit]

What criteria do courts use to ascertain whether a procedural event is nonprejudicial? And if it *is* nonprejudicial, does that mean the event does not violate the defendant's rights? Or does it mean, instead, that although the defendant's rights were violated, the violation is not important enough to justify certain judicial remedies? Criminal procedure doctrine offers a range of disparate answers to each of these questions.

One area of inconsistency has to do with how the law defines *prejudice*. Even narrowing the relevant universe of prejudice rules to those dealing with "harm or injury"[20] as opposed to bias[21]—a largely unrelated type of prejudice that I do not cover here—the idea of harm is hardly self-defining. For our purposes, the key point is that some prejudice rules adopt an outcome-centric metric of harm, whereas others do not. *Outcome-centric* rules measure harm solely by asking whether a procedural event will affect, or already has affected, the outcome.[22] To illustrate, the test for prejudice in the *Brady* context is "a reasonable probability that, had the [favorable] evidence been disclosed to the defense, the result of the proceeding would have been different."[23] On the other hand, *non-outcome-centric* rules define harm more expansively to include both the risk of an adverse outcome as well as injury to other interests. Sixth Amendment speedy trial doctrine, for example, assesses prejudice by reference to all three "interests of defendants which the speedy trial right was designed to protect," which are "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."[24]

Prejudice rules also differ from one another concerning where they fit within criminal procedure's right/remedy divide. Some restrict the scope of procedural rights, producing what I call *prejudice-based rights*: rights that apply only when failing to apply them would cause prejudice. To mention just one example (with more soon to follow[25]), the Supreme Court has indicated that the right to effective assistance of counsel is violated by deficient representation only if the deficiency results in prejudice.[26] By contrast, other

judges," including Judge Hand, concerning Judge Frank's "great reluctance to view any trial error as 'harmless'" and his corresponding "solicitude for criminal defendants' claims").

20 *Prejudice*, OXFORD DICTIONARY OF ENGLISH 1388 (2d rev. ed. 2005) ("Harm or injury that results or may result from some action or judgement.") (second definition).

21 *See id.* ("Preconceived opinion that is not based on reason or actual experience.") (first definition).

22 *See generally* Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 997-1012 (2015).

23 United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *see also infra* note 44 and accompanying text.

24 Barker v. Wingo, 407 U.S. 514, 532 (1972).

25 *See infra* Section I.B.

26 Strickland v. Washington, 466 U.S. 668, 691-92 (1984); *see also infra* notes 57–64 and accompanying text.

prejudice rules are remedial in nature.[27] They cut off access to certain remedies for nonprejudicial violations of procedural rights, yet they do so without incorporating prejudice into the definition of the affected rights. The harmless error doctrine is paradigmatic. Generally speaking, it prohibits reversal of a criminal conviction or sentence based on violations of defendants' rights that caused no prejudice.[28] But a harmless error is "still an error"[29]—that is, a violation of the defendant's rights—despite the absence of prejudice, since harmless error review classifies prejudice as a limit on remedies rather than rights.[30]

This taxonomy clarifies the parameters of my thesis. The concerns that animate this Article have to do, not with prejudice as such, but with a uniquely combustible mix of the ingredients described earlier. My critique, which I spell out in Part II, is directed primarily at prejudice rules that (1) define prejudice by reference to outcomes and (2) restrict rights, not just remedies, thus forming *outcome-centric prejudice-based rights*.

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27 I use the term *remedy* in the same sense as Doug Laycock, who has said that remedies are concerned with "what to do about a completed or threatened violation of law," a question that is "distinct from . . . whether there has been or is about to be a violation." Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 164-65 (2008).

28 The harmless error test for constitutional errors reviewed on direct appeal, for instance, asks whether the prosecution can "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict." Chapman v. California, 386 U.S. 18, 24 (1967). By contrast, when constitutional errors are reviewed in a federal postconviction proceeding, the test is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). For a helpful summary of these and other variants of the harmless error doctrine as it relates to constitutional errors, see John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59, 71-79 (2016).

29 *E.g.*, State v. Cullen, 39 S.W.3d 899, 906 (Mo. Ct. App. 2001) ("[I]t *is* still error—albeit 'harmless' error—for a trial court to allow proof of a defendant's prior or persistent offender status after submission of the case to the jury.").

30 This, at any rate, is the conventional way to understand the harmless error doctrine. *See, e.g.*, Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 17 (1994) (stating that harmless error "is best viewed as a question of the law of remedies" because it deals with "whether a particular form of relief—the reversal of a conviction or the vacation of a judgment—should be available to redress the past wrong" (latter quoting Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1770 (1991))). Dan Epps has recently staked out a contrary position, arguing that "harmless error analysis is best understood as an inquiry about constitutional rights, not remedies" because subjecting violations of a right to harmless error review is "functionally indistinguishable" from making prejudice part of the right. Epps, *supra* note 13, at 2122, 2162. Here, I think the conventional wisdom is essentially correct. The key premise supporting Epps's revisionist account—that right-restricting prejudice rules and harmless error rules are "functionally indistinguishable," *id.* at 2162—is mistaken for reasons I explore below. *See infra* Part II.

### B. *Prejudice-Based Rights in Constitutional Doctrine*

A number of core constitutional protections, most notably *Brady* and effective assistance of counsel, qualify as outcome-centric prejudice-based rights under current Supreme Court precedent. This Section describes these rights and their associated prejudice requirements.

#### 1. *Brady*

The scope of criminal discovery is and long has been remarkably narrow in many U.S. jurisdictions, especially when compared with the norm in civil litigation.[31] Constitutional doctrine has by and large sought to avoid disrupting America's venerable tradition of trial by ambush.[32] The most important exception to this pattern is the *Brady* rule, which obligates the government to disclose evidence within its knowledge that is both favorable and material to the defense.

In *Brady*, the Supreme Court considered whether a new trial was required because the prosecutor had suppressed an accomplice's confession that was relevant to the capital trial's penalty phase.[33] The Court held that the defendant was entitled to a new trial as to the penalty phase (where the suppressed evidence might have mattered), but not as to the guilt phase (where, according to the Court, the evidence would have been inadmissible).[34] In reaching that conclusion, the Court announced the following rule: "suppression by the prosecution of evidence favorable to an

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31 "Historically, discovery was unavailable in either civil or criminal cases, and, despite the full development of discovery in civil cases, denial in criminal cases . . . persisted" until well into the twentieth century. Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 294 (1960). Today, criminal discovery practices are "remarkably diverse across 50 state jurisdictions and the federal courts." Darryl K. Brown, *Discovery*, *in* 3 REFORMING CRIMINAL JUSTICE 147, 148 (Erik Luna ed., 2017). Fifteen states and the federal government follow "the narrowest approach," which "require[s] very little" disclosure in a number of crucial categories, *id.* at 155, whereas six states embrace "very broad discovery," *id.*, while the rest follow various "intermediate" options, *id.* at 156.

32 According to the Supreme Court, "[t]here is no general constitutional right to discovery in a criminal case," and "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . ." Weatherford v. Bursey, 429 U.S. 545, 559, 562 (1977) (latter quoting Wardius v. Oregon, 412 U.S. 470, 474 (1973)).

33 *See* Brady v. Maryland, 373 U.S. 83, 84-85 (1963). At trial, John Brady admitted participating in the charged murder but argued to the jury that he should not receive the death penalty since his companion, Boblit, was the one who actually killed the victim. *Id.* at 84. Before trial, Brady's lawyer had asked the prosecution to let him examine Boblit's out-of-court statements. *Id.* The prosecution complied in part, but suppressed one statement in which Boblit "admitted the actual homicide." *Id.*

34 *See id.* at 88-90.

accused upon request[35] violates due process where the evidence is material either to guilt or to punishment."[36]

*Brady* did not specify what makes evidence "material" to the defense.[37] Was the Court referring to materiality in the expansive evidentiary sense of the term? Or did the Court envision some sort of prejudice requirement? *Brady* did not supply a clear answer to that question.[38] Nor did *Brady* shed much light on whether materiality represents a limit on the defendant's constitutional rights, or remedies—specifically, the remedy of a new trial.[39]

The Court's later decision in *United States v. Bagley* resolved the first set of questions (what does materiality mean?) and commented on—without definitively resolving—the second (does materiality have to do with rights or remedies?).[40] *Bagley* came to the Supreme Court by way of the Ninth Circuit, which had required "automatic reversal" in cases where the prosecution suppressed impeachment information that the defense had requested before trial and needed for "*effective* cross-examination."[41] All nine justices spurned this automatic reversal rule, but divided over other aspects of the case.[42]

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35 Although *Brady*'s holding was arguably confined to cases where the defense had "request[ed]" the suppressed evidence, *id.* at 87, later cases dispensed with any such requirement. *See generally* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 5.3 (2d ed. 2001).

36 *Brady*, 373 U.S. at 87. The Court cast this rule as "an extension" of *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam), and its progeny. *Id.* at 86; *cf. infra* note 83 (discussing the *Mooney* doctrine).

37 *Brady*, 373 U.S. at 87.

38 *Compare* United States v. Bagley, 473 U.S. 667, 703 n.5 (1985) (Marshall, J., dissenting) ("*Brady* might have used the word [material] in its evidentiary sense, to mean, essentially, germane to the points at issue."), *with* United States v. Agurs, 427 U.S. 97, 104 (1976) ("[I]mplicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.").

39 Viewed in isolation, the canonical formulation of *Brady*'s holding, quoted above in full, appears to suggest that materiality is among the elements that determine when suppression violates due process—or simply put, that materiality goes to rights, not remedies. *See Brady*, 373 U.S. at 87 (stating that suppression "violates due process" where, among other things, "the evidence is material"). But elsewhere in *Brady*, the Court summed up the content of its newly minted constitutional rule without any mention of materiality. *See, e.g.*, *id.* at 86-87 (approving a Third Circuit case that had "state[d] the correct constitutional rule," and citing that case for the proposition that "the 'suppression of evidence favorable' to the accused was itself sufficient to amount to a denial of due process" (quoting United States *ex rel.* Almeida v. Baldi, 195 F.2d 815, 820 (3d Cir. 1952))).

40 473 U.S. 667, 682 (1985). For a guide to the main developments in *Brady* doctrine during the two decades between *Brady* itself and *Bagley*, see Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1143-55, 1175-82 (1982). The most important of these intervening developments relates to *Agurs*, a case discussed in Section I.C, *infra* notes 91–99.

41 Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983) (latter quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)).

42 Even the dissenters would have held, contrary to the Ninth Circuit, that some kind of prejudice analysis—and not automatic reversal—should apply to *Brady* claims asserted on appeal or postconviction review, including for claims based on evidence the defense had requested and the prosecution nevertheless suppressed. *See Bagley*, 473 U.S. at 696 (Marshall, J., dissenting) (arguing that *Brady* violations should be subject to harmless error review under *Chapman v. California*, 386

Justice Blackmun's opinion for the Court held that the suppression of evidence requires reversal "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."[43] And five justices, writing in two separate opinions, indicated that evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[44]

*Bagley* thus answered the question of what prejudice means (or more precisely, what *materiality* means) for purposes of the *Brady* doctrine.[45] Moreover, passages in *Bagley*[46] and subsequent decisions[47] strongly suggest that the Court's outcome-centric "reasonable probability"[48] test for prejudice determines the scope of the defendant's due process right, not just whether a violation of that right warrants the remedy of a new trial. Some academics, to be sure, have forcefully made the case that those passages should be discounted as dicta.[49] And a number of lower courts have embraced the idea that *Bagley*'s materiality standard solely restricts access to the remedy of a new trial, without affecting the shape of the underlying due process right.[50] As a normative matter, I agree with that result, for reasons developed later

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U.S. 18 (1967)); *id.* at 709-15 (Stevens, J., dissenting) (arguing that in suppression cases involving either "knowing use of perjured testimony" by the prosecution, or favorable evidence "specifically requested by the defendant," reviewing courts should reverse if "there was 'any reasonable likelihood' that [the evidence] 'could have affected' the outcome of the trial" (quoting *Agurs*, 427 U.S. at 103), but that a less defense-friendly prejudice test should apply if "there had been neither perjury nor a specific [defense] request").

43 *Id.* at 678.

44 *Id.* at 682 (opinion of Blackmun, J., joined by O'Connor, J.); *accord id.* at 685 (White, J., concurring in part and in the judgment, joined by Burger, C.J., and Rehnquist, J.). The Court cribbed this "reasonable probability" standard from *Strickland v. Washington*, 466 U.S. 668 (1984), the landmark case on ineffective assistance that the Court had decided a year earlier. *See Bagley*, 473 U.S. at 682, 685; *cf. infra* subsection I.B.2 (discussing *Strickland*).

45 *See, e.g.*, Turner v. United States, 137 S. Ct. 1885, 1893 (2017) (reiterating that "material" means "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different" (quoting Cone v. Bell, 556 U.S. 449, 469-70 (2009)).

46 *See, e.g.*, *Bagley*, 473 U.S. at 674 ("The holding in *Brady* . . . requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" (quoting *Brady*, 373 U.S. at 87 (1963))).

47 Most revealingly, one case states that "[a] '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence . . . although . . . there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler v. Greene, 527 U.S. 263, 281 (1999).

48 *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.).

49 *See* Janet C. Hoeffel & Stephen I. Singer, *Activating a* Brady *Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. REV. L. & SOC. CHANGE 467, 469-73 (2014). For a contrary view, see generally Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415 (2011).

50 Many other courts disagree, resulting in a split discussed later. *See infra* notes 120–31 and accompanying text.

on.[51] But as a descriptive matter, the dominant understanding of *Brady*—shared by many lower courts and well grounded in the language if not, perhaps, the holdings of the Supreme Court's foundational precedents—conceptualizes materiality as a core ingredient that defines the outer boundaries of the defendant's disclosure rights.[52]

### 2. Effective Assistance of Counsel

"Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[53] Without the aid of a trained advocate, many defendants—whether innocent or otherwise—would be ill equipped to negotiate pleas on a level playing field with the prosecutor, litigate meritorious procedural claims, test the government's proof at trial, or make the case for a reasonable sentence. Representation by counsel is often indispensable for attaining these goals. Yet more is needed than "mere formal appointment" of an attorney, or else the safeguards flowing from the right to counsel would be illusory.[54] The right to counsel has thus come to mean a "right to the effective assistance of counsel."[55]

The landmark case concerning the Sixth Amendment's effective assistance doctrine is *Strickland v. Washington*.[56] *Strickland* held that to prove ineffective assistance after conviction, the defendant must show both that counsel performed deficiently and that the deficient performance resulted in prejudice.[57] The Court acknowledged that for certain kinds of ineffective

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51 *See infra* Section III.A.

52 *See infra* notes 127–31 and accompanying text.

53 Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956); *accord* United States v. Cronic, 466 U.S. 648, 654 (1984). Justice Schaefer's widely quoted claim, however, is subject to a rather glaring caveat. Under current constitutional doctrine, the right to counsel does not apply in misdemeanor prosecutions that do not lead to imprisonment. *See* Scott v. Illinois, 440 U.S. 367, 373-74 (1979); *cf.* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 49 (2013) (criticizing *Scott* and calling for the Court to extend the right to counsel "to all criminal cases").

54 *See* Avery v. Alabama, 308 U.S. 444, 446 (1940) ("The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.").

55 *Cronic*, 466 U.S. at 654 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

56 466 U.S. 668 (1984). The law on effective assistance of counsel began to take shape long before *Strickland*. *See generally* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 65-73 (1986).

57 466 U.S. at 687. The defendant, David Leroy Washington, challenged his death sentence on the theory that his court-appointed lawyer failed to investigate or present evidence about his precarious mental condition and his good character. *See id.* at 672, 675-76. The Court deemed Washington's claim "a double failure," as he could not prove "either deficient performance or sufficient prejudice." *Id.* at 700.

assistance, "prejudice is presumed."[58] But such cases represent rare exceptions to the "general requirement that the defendant affirmatively prove prejudice."[59] And to satisfy that requirement, the defendant ordinarily[60] has to establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[61]

Does *Strickland*'s prejudice requirement belong to the jurisprudence of Sixth Amendment rights, or remedies? Put differently, is prejudice a defining component of the right to effective assistance of counsel, or a remedial issue for reviewing courts to sort out when deciding whether a violation of that right warrants setting aside a trial court judgment? Neither *Strickland* nor the Supreme Court's other ineffective assistance cases have squarely addressed this question. And lower courts have reached conflicting conclusions, much as they have in deciding whether *Brady*'s materiality requirement pertains to rights or remedies.[62] But *Strickland*'s reasoning (parts of it, anyway[63]) strongly suggests that prejudice is an element of the underlying constitutional right, not just a remedial question, and the Court has echoed that suggestion in many of its post-*Strickland* decisions.[64]

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58 *Id.* at 692; *see generally* JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 186-88 (2002). There is a presumption of prejudice, according to *Strickland*, for Sixth Amendment claims alleging "[a]ctual or constructive denial of the assistance of counsel altogether" as well as "various kinds of state interference with counsel's assistance." 466 U.S. at 692 (latter citing *Cronic*, 466 U.S. at 659 & n.25). *Strickland* also mentioned "a similar, though more limited, presumption of prejudice" where the defendant can show "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected [the] lawyer's performance.'" *Id.* at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980)).

59 *Id.* at 693.

60 Some of the Court's ineffective assistance cases require proof of prejudice while modifying certain features of *Strickland*'s test. *See, e.g.*, Hill v. Lockhart, 474 U.S. 52, 59 (1985) (holding that, where counsel's ineffective advice allegedly prompted the defendant to plead guilty, the appropriate prejudice inquiry is whether "there is a reasonable probability that, but for counsel's errors, [the defendant] . . . would have insisted on going to trial").

61 *Strickland*, 466 U.S. at 694.

62 *See infra* notes 153–71, 293–95 and accompanying text.

63 Consider, for instance, *Strickland*'s claim that a prejudice requirement is implicit in the "purpose" of the right to counsel itself and that, therefore, attorney errors "must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." 466 U.S. at 691-92. By contrast, other parts of the *Strickland* opinion—including the question presented as stated in the opinion's opening sentence—imply that the Court's holding might be restricted to its (postconviction) remedial context. *See id.* at 671 (noting that "[t]his case requires us to consider the proper standards for judging . . . [whether] the Constitution requires *a conviction or death sentence to be set aside* because counsel's assistance at the trial or sentencing was ineffective." (emphasis added)); *see also infra* notes 86–90 and accompanying text (discussing the Court's emphasis on remedy-specific concerns relating to the finality of criminal judgments in *Strickland*).

64 *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) ("Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." (citing *Strickland*, 466 U.S. at 685)).

### 3. Additional Illustrations

In addition to *Brady* and effective assistance of counsel, a number of other constitutional rights also contain outcome-centric prejudice requirements according to the Supreme Court's precedents.[65] These rights mostly fall within one or both of two categories—categories that include *Brady* but are not limited to it. The first is "what might loosely be called the area of constitutionally guaranteed access to evidence,"[66] and the second encompasses much of what the Constitution has to say about prosecutorial misconduct at trial. I offer only a cursory sketch of each category here—just enough to reveal the range of constitutional doctrines potentially implicated by the critique of outcome-centric prejudice-based rights that I develop later in the Article.

The field of "constitutionally guaranteed access to evidence"[67] is home to an especially dense concentration of outcome-centric prejudice-based rights.[68] One set of decisions, originating in *United States v. Marion*,[69] grants limited protection against pre-accusation delay so as to minimize the loss of potential defense evidence.[70] This right, however, is violated only when the delay results in "actual prejudice,"[71] which many lower courts plausibly take to mean some likelihood that the delay affected or will affect the outcome.[72] Building on *Marion*, *Brady*, and related cases, *United States v. Valenzuela-Bernal* held that deportation of potential defense witnesses would violate due process and compulsory process "only if there is a reasonable likelihood" that

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65 The list of such rights would grow longer still if we were to consider issues percolating in the lower courts. For example, courts appear divided over "whether the [constitutional] right to present relevant, material evidence in one's own defense is conditioned on a showing that such evidence is likely to affect the outcome of the trial." Brief for National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 2, Heath v. United States, 571 U.S. 1125 (2014) (No. 12-11003), 2013 WL 3895248. *But see* Brief for United States in Opposition at 19-23, *Heath*, 571 U.S. 1125 (on file with author).

66 United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

67 *Id.*

68 *See generally* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(a) (4th ed. 2015). The smorgasbord of constitutional rights that fit this rubric derive from due process, the Sixth Amendment's Compulsory Process Clause, or both, and their doctrinal tests generally "focus[] on the totality of the circumstances and weigh[] such factors as . . . the likelihood of prejudicial impact on the outcome of the particular case." *Id.*

69 404 U.S. 307 (1971).

70 *See* United States v. Lovasco, 431 U.S. 783, 789 (1977) (discussing due process limitations that "protect[] against oppressive delay" (citing *Marion*, 404 U.S. 307)). This due process right is distinct from, and somewhat less protective than, the more familiar Sixth Amendment speedy trial right applicable to post-accusation delay. *See generally* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607, 610 (1990).

71 *Lovasco*, 431 U.S. at 789; *see also id.* at 790 ("[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim . . . .").

72 *See, e.g.*, Jones v. Angelone, 94 F.3d 900, 907 (4th Cir. 1996).

the witnesses' testimony could sway the outcome.[73] And *California v. Trombetta*[74] and *Arizona v. Youngblood*[75] established modest limits on the government's prerogative to destroy or fail to preserve potential defense evidence if that evidence meets a "standard of constitutional materiality" derived largely from *Brady* law.[76]

Constitutional rights relating to prosecutorial misconduct at trial are also typically tied to a risk of outcome-determinative prejudice. The foundational case in this area is *Donnelly v. DeChristoforo*, which held that improper prosecutorial remarks during argument to the jury violate due process only when "such remarks, in the context of the entire trial, were sufficiently prejudicial."[77] Later cases have applied the *Donnelly* standard to numerous other forms of prosecutorial misconduct (and beyond),[78] and clarified that its test for prejudice has an outcome-centric flavor.[79] To be sure, the *Donnelly* line of cases does not exhaust the field of constitutional regulation—let alone *nonconstitutional* regulation[80]—for prosecutorial misconduct. Misconduct that violates enumerated rights, such as the privilege against self-incrimination, is defined without reference to prejudice (though it is subject to harmless error review on appeal).[81] The same is also true of a few due process-based constraints on misconduct, such as the rules announced in *Doyle v. Ohio*[82] and,

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73 458 U.S. 858, 873-74 (1982).

74 467 U.S. 479 (1984).

75 488 U.S. 51 (1988).

76 *Trombetta*, 467 U.S. at 489; *see id.* at 488 & n.8 (stating that "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense," and comparing this restriction to the *Brady* doctrine's "similar requirement of materiality"); *see also Youngblood*, 488 U.S. at 56 n.* (applying "the standard of constitutional materiality in *Trombetta*").

77 416 U.S. 637, 639 (1974); *see also* Greer v. Miller, 483 U.S. 756, 765-67 (1987); Darden v. Wainwright, 477 U.S. 168, 180-84 (1986).

78 *See, e.g.*, Dugger v. Adams, 489 U.S. 401, 410 (1989) (citing *Donnelly* for the proposition that the defendant "could have challenged the improper remarks *by the trial judge* at the time of his trial as a violation of due process" (emphasis added)).

79 *See Greer*, 483 U.S. at 765-67 & n.7. *Greer* held that the improper prosecutorial argument at issue there did not prejudice the defendant under the *Donnelly* standard, relying in part on the lower court's conclusion that, under *Chapman v. California*, 386 U.S. 18 (1967), "the prosecutor's question was harmless beyond a reasonable doubt." *Id. at* 765. The Court reasoned in part that *Chapman*'s outcome-centric prejudice standard "is more demanding [from the prosecution's standpoint] than the 'fundamental fairness' inquiry of the Due Process Clause," making it "clear" that the district court—having found the impropriety harmless even under *Chapman*—"also would have found no due process violation" under *Donnelly*. *Id.* at 765 n.7.

80 *See generally* GERSHMAN, *supra* note 35, § 14.

81 *See, e.g.*, *Chapman*, 386 U.S. at 19-20, 25-26 (applying harmless error review where the prosecutor commented on the defendants' choice not to testify in violation of the Fifth Amendment as construed by *Griffin v. California*, 380 U.S. 609 (1965)).

82 *See* 426 U.S. 610, 619 (1976) (holding that due process is violated where a prosecutor impeaches a testifying defendant using the defendant's silence after being arrested and Mirandized); *see also* Brecht v. Abrahamson, 507 U.S. 619, 629-30 (1993) (applying harmless error review to *Doyle* errors).

more debatably, *Mooney v. Holohan*.[83] But for the most part, current precedent makes prejudice an element of constitutional claims alleging prosecutorial misconduct connected with the trial process.

### C. *Finality and Fairness in the Balance*

The cases reviewed in the previous Section fail to articulate a clear rationale for hardwiring outcome-centric prejudice into the structure of procedural rights. Indeed, those cases rarely even acknowledge the possibility that prejudice might be operationalized in a non-outcome-centric fashion.[84] Nor do they carefully consider whether prejudice should limit rights rather than remedies. The case law does, however, shed some indirect light on the thinking behind the Supreme Court's outcome-centric, right-restricting prejudice rules. The Court's foundational decisions in this area often emphasize the need to strike a balance between preventing the wrongful conviction of innocent defendants and promoting countervailing state interests such as the interest in restricting appellate and postconviction review so as to preserve the finality of criminal convictions and sentences.[85]

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83 294 U.S. 103 (1935) (per curiam). *Mooney* has come to stand for the proposition that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment" and that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue v. Illinois, 360 U.S. 264, 269 (1959). Outcome-centric prejudice is needed to obtain reversal under *Mooney*: specifically, there must be a "reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976) (citing, among other cases, *Napue*, 360 U.S. at 271). What is less clear is whether this "reasonable likelihood" requirement determines when due process is violated or merely when such a violation warrants setting aside a judgment. *Cf.* United States v. Bagley, 473 U.S. 667, 679-80 (1985) (opinion of Blackmun, J.) ("Although [the *Mooney/Napue*] rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review, it may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." (footnote omitted)).

84 *Strickland* represents a partial exception to this pattern of neglect, since the Court considered and rejected the defendant's argument that a non-outcome-centric prejudice test—which would ask whether counsel's errors "impaired the presentation of the defense"—should apply to ineffective assistance claims predicated on specific attorney errors. Strickland v. Washington, 466 U.S. 668, 693 (1984); *see also infra* note 87 and accompanying text.

85 The Supreme Court's preoccupation with finality in these decisions may seem strange to a modern observer. After all, the Court's earlier decision in *Chapman v. California*, 386 U.S. 18 (1967), had already provided courts with one powerful tool—harmless error review—to shield the finality of criminal judgments against nonprejudicial constitutional errors. *See supra* notes 28–30 and accompanying text. The Court has never told us why harmless error review under *Chapman* is sufficient to safeguard finality with respect to most kinds of constitutional error, but insufficient in relation to *Brady*, effective assistance, and a handful of other constitutional rights. A key part of the explanation, it seems to me, has to do with the fact that *Brady* and effective assistance claims ordinarily depend on belatedly revealed facts outside the trial court record. As a result, such claims must often be resolved through a habeas proceeding or other postconviction review mechanism—disfavored avenues in which "a presumption of finality and legality attaches to the conviction and

*Strickland* is illustrative. In the section of the opinion announcing the effective assistance doctrine's prejudice requirement, the Court began by stating that an attorney error "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[86] Echoing this theme, the Court went on to reject the defendant's proposed test for prejudice (whether counsel's errors "impaired the presentation of the defense") because that test could not clarify which attorney errors "are sufficiently serious to warrant setting aside the outcome of the proceeding."[87] The Court then lauded the "strengths" of the prejudice standard advanced by the United States as amicus (whether attorney errors "more likely than not altered the outcome"), emphasizing that it "reflects the profound importance of finality in criminal proceedings."[88] Yet the Court determined that the United States' standard was "not quite appropriate" because "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result . . . is reliable," and thus "finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower."[89] Ultimately, the Court struck a somewhat different balance between reliability

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sentence"—rather than on direct appeal. *Brecht*, 507 U.S. at 633 (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983)). Perhaps, then, the Court was concerned that *Chapman*'s perceivedly defense-friendly harmless error rule, though suitable for constitutional claims that tend to arise on direct appeal, was inappropriate for claims that frequently necessitate postconviction review. *Cf. id.* at 636 ("[W]e think the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, that would be derived from its application on collateral review."). And since the Court had not yet held—as it later would in *Brecht*—that a different, relatively prosecution-friendly harmless error standard applies on postconviction review than on direct appeal, the Court may have folded prejudice into the definition of *Brady*, effective assistance, and certain other rights as a means of circumventing *Chapman*.

86 *Strickland*, 466 U.S. at 691 (citing United States v. Morrison, 449 U.S. 361, 364-65 (1981)). Revealingly, the *Morrison* case that *Strickland* cites here for support defends the need for prejudice analysis on remedial grounds. The court of appeals had held that "the appropriate remedy" for the underlying right to counsel violation was dismissal of the indictment with prejudice. *Morrison*, 449 U.S. at 363. The Supreme Court assumed without deciding that a Sixth Amendment violation had occurred and reversed the appeals court's remedial ruling due to lack of prejudice. *Id.* at 363-64. For the sake of "preserving society's interest in the administration of criminal justice," the Court concluded that unless the right to counsel error had an "impact on the criminal proceeding, . . . there is no basis for imposing a remedy in that proceeding . . . ." *Id.* at 364-65.

87 *Strickland*, 466 U.S. at 693 (quoting the respondent's brief). The Court also cited pragmatic concerns related to after-the-fact review to explain why a "presumption of prejudice" is inappropriate for ineffective assistance claims stemming from attorney errors. *Id.* at 692-93; *cf. supra* note 58 (discussing other aspects of the right to counsel for which prejudice is presumed). The Court explained in part that a presumption of prejudice "is reasonable for the criminal justice system" when "impairments of the Sixth Amendment . . . are easy to identify and . . . easy for the government to prevent" but that "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Strickland*, 466 U.S. at 692-93.

88 *Id.* at 693.

89 *Id.* at 694.

and finality by holding that "the appropriate test for prejudice" asks whether there is a "reasonable probability" that counsel's errors affected the outcome.[90]

As another example, consider *United States v. Agurs*[91]—a *Brady* case that profoundly influenced not only the trajectory of *Brady*'s materiality doctrine,[92] but the evolution of prejudice rules outside the *Brady* context as well.[93] *Agurs* addressed what materiality test should apply when the defense had not made a "specific and relevant request" for favorable evidence known to the prosecution.[94] The Court stated that, on one hand, "[i]f evidence highly probative of innocence is in [the prosecutor's] file, he should be presumed to recognize its significance" and disclose it irrespective of what the defense did or did not request.[95] But "[c]onversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial . . . ."[96] So the Court rejected a "severe" rule requiring the defense to prove that suppressed evidence "probably would have resulted in acquittal."[97] Even so, the Court insisted that a "judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard."[98] Instead, the Court concluded that "[t]he proper standard of materiality"—which "must reflect our overriding concern with the justice of the finding of guilt"—should focus on whether "the omitted evidence creates a reasonable doubt that did not otherwise exist."[99]

To be clear, my point here is not that interest balancing is the sole interpretive modality employed in the Supreme Court's decisions creating outcome-centric prejudice-base rights. It is not.[100] And even when those

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90 *Id.*; *cf. supra* subsection I.B.2 (discussing *Strickland*'s prejudice standard).

91 427 U.S. 97 (1976).

92 *See, e.g.*, United States v. Bagley, 473 U.S. 667, 674-78 (1985) (opinion of the Court) (relying on *Agurs*); *id.* at 682 (opinion of Blackmun, J.) (endorsing "the *Strickland* formulation of the *Agurs* test for materiality").

93 *See, e.g.*, California v. Trombetta, 467 U.S. 479, 488-89 & n.8 (1984) (relying on *Agurs*); *Strickland*, 466 U.S. at 694 (same); United States v. Valenzuela-Bernal, 458 U.S. 858, 866, 868, 874 n.10 (1982) (same).

94 *Agurs*, 427 U.S. at 106; *see also id.* at 107-14. Though not relevant to the point I am making here, it bears noting that *Agurs*'s narrow holding—that the test for materiality should vary depending on whether the defense lodged a specific request for evidence that the prosecution suppressed—is no longer good law. *See* GERSHMAN, *supra* note 35, § 5.3.

95 *Agurs*, 427 U.S. at 110.

96 *Id.*

97 *Id.* at 111.

98 *Id.* at 111-12; *see also id.* at 112 (referring to the federal harmless error standard applicable to most nonconstitutional errors, which asks whether a reviewing court's "conviction is sure that the error did not influence the jury, or had but very slight effect" (quoting Kotteakos v. United States, 328 U.S. 750, 764 (1946))).

99 *Id.* at 112.

100 As other commentators have noted, some of those decisions employ purposive reasoning by "constru[ing] a defendant's rights in light of *and as limited by* their perceived purpose of ensuring the reliability of guilty verdicts." Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88

decisions do engage in balancing, finality is not the only weight appearing on the government's side of the scale. For instance, *Bagley* and other cases relating to *Brady*'s materiality requirement also express the concern that "a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice'" and "displace the adversary system as the primary means by which truth is uncovered."[101]

Neither of these caveats, however, undermines the central premise advanced in this Section—namely, that interest balancing and remedy-specific concerns about preserving finality are prominent, albeit not exhaustive, justificatory themes in this body of law. That premise sets the stage for the next Part, where I will show—at least for *Brady* and effective assistance of counsel, and potentially for other outcome-centric prejudice-based rights as well—that the precarious balance the Court sought to strike, though perhaps understandable when viewed in historical context, is no longer defensible today.

## II. CRITIQUE

This Part sets forth my critique of outcome-centric, right-restricting prejudice rules. Ordinarily, when courts design rules aimed at safeguarding the finality of criminal judgments, they do so through remedial doctrines—like harmless error,[102] forfeiture,[103] and so on—that limit defendants' access to appellate and postconviction review without altering how procedural rights get administered at the trial court level. Right-restricting prejudice rules do not work that way. When prejudice defines the scope of a right, it becomes relevant at every stage of the criminal process—not just in appellate and postconviction proceedings that implicate finality, but also when trial judges and, in some instances, prosecutors and police officers, implement those

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COLUM. L. REV. 79, 120 (1988); *see also* Strickland v. Washington, 466 U.S. 668, 691-92 (1984) (deriving the prejudice requirement for effective assistance claims partly from "[t]he purpose of the Sixth Amendment guarantee of counsel . . . to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding"). Relatedly, the Court's cases discussing prejudice in the context of unenumerated rights often (though not invariably) suggest that case-specific assessment of prejudice is part and parcel of the "fundamental fairness" inquiry at the heart of due process doctrine. *E.g.*, Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1974); *see also* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 395-96 (2001) ("[M]any of the due process rulings (although certainly not all) make a defense showing of likely prejudice an element of the constitutional violation, in contrast to rulings under most (but not all) specific guarantees . . . ." (footnotes omitted)).

101 *E.g.*, United States v. Bagley, 473 U.S. 667, 675 & n.7 (1985) (quoting Giles v. Maryland, 386 U.S. 66, 117 (1967) (Harlan, J., dissenting)).

102 *See supra* notes 28–30 and accompanying text.

103 *See, e.g.*, United States v. Olano, 507 U.S. 725, 739 (1993) (discussing limits on courts' "remedial authority" to reverse trial court judgments based on unpreserved claims).

rights before a defendant has been convicted or sentenced. That is problematic both because there is rarely a sensible way to forecast the probability of outcome-determinative prejudice in advance of the outcome and because, in any event, the law should accord a fair process even when such process is unlikely to change the outcome.

### A. *Prejudice-Based Rights at the Trial Court Level*

Constitutional criminal procedure gets implemented through a range of different mechanisms, by courts as well as various nonjudicial actors. Consider the Fourth Amendment.[104] Even before the initiation of any court proceedings, the Fourth Amendment furnishes conduct rules that law enforcement officers must obey when carrying out searches and seizures. If the police violate those rules or are likely to do so imminently, constitutional search and seizure law can be enforced via civil actions (seeking damages for past injuries or prospective relief) and also in criminal proceedings (through the exclusionary rule). In either of these adjudicative settings, appellate relief is potentially available if the trial court misapplies the relevant legal principles.[105] Since constitutional implementation is a complex process with many moving parts, structuring constitutional rights to alleviate problems tied to one remedial context can cause trouble—sometimes inadvertently—in other contexts.[106]

That is precisely what has happened, I argue, in the area of prejudice-based rights. With respect to *Brady*, effective assistance of counsel, and several other constitutional rights, the Supreme Court has designed right-restricting prejudice rules to address finality concerns associated with a particular set of remedial environments, without carefully assessing how that design might impact other mechanisms for implementing rights.[107] Indeed, the Court often

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104 *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1 (5th ed. 2012).

105 Ordinarily, a convicted defendant who unsuccessfully raises a claim of constitutional error on direct appeal may seek further review in both state and federal postconviction proceedings. *See* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 446-47 (2017). That is not the case, however, for most claims involving the Fourth Amendment exclusionary rule, which, under *Stone v. Powell*, 428 U.S. 465 (1976), are noncognizable in federal postconviction proceedings as long as state courts have "provided an opportunity for full and fair litigation." *Id.* at 494.

106 *See, e.g.*, Michael Coenen, *Spillover across Remedies*, 98 MINN. L. REV. 1211, 1218-19 (2014) (arguing that "[w]hen one remedy affects the scope of a substantive rule, the cross-remedial nature of that rule threatens to distort its development within other remedial settings").

107 *See generally supra* Section I.C (discussing the role of finality in these doctrinal areas). Some of the Court's decisions are less vulnerable to this charge than others. In particular, the Court expressly recognized in *Valenzuela-Bernal* that the right-restricting prejudice rule it adopted there would make the underlying right hard to apply and enforce before trial. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982) ("Because determinations of materiality are often best

discusses outcome-centric, right-restricting prejudice rules as though they were little more than variations on the harmless error doctrine[108]—which truly is a remedy-specific rule with virtually no formal relevance to the administration of rights before the point of conviction.[109] Many scholars have followed suit, contending that the prejudice requirements found in *Brady* and effective assistance doctrine are "functionally indistinguishable" from harmless error rules,[110] or that they are best thought of as "camouflaged harmless error doctrines."[111] There is something to be said for this perspective: when a convicted defendant seeks relief on appeal or through a postconviction challenge, the differences between *Strickland*'s prejudice standard, for example, and the generally applicable tests for harmless error are largely a matter of degree. What these cases and commentators overlook, however, is that right-restricting prejudice rules can also seriously impair the efficacy of rights at the trial court level.[112]

This Section examines the pretrial and midtrial impact of outcome-centric, right-restricting prejudice rules, focusing on two main points. First, when courts incorporate prejudice into the definition of rights, prejudice becomes part of any conduct rules that those rights prescribe for nonjudicial actors. This in effect authorizes those actors—as relevant here, prosecutors and police officers—to withhold procedural safeguards when doing so is unlikely to affect the outcome. Second, defining rights in terms of prejudice diminishes the capacity of trial courts to enforce them in cases where

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made in light of all of the evidence adduced at trial, judges may wish to defer ruling on motions until after the presentation of evidence.").

108 *See, e.g.*, United States v. Bagley, 473 U.S. 667, 679-80 (1985) (opinion of Blackmun, J.) (relevant text quoted in *supra* note 83).

109 *See supra* notes 28–30 and accompanying text.

110 Epps, *supra* note 13, at 2162; *accord* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1253 (2005) (contending that constitutional rights sometimes include "a prejudice component that operates as a kind of internal harmless error doctrine").

111 David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105, 1159-62 (1999); *accord* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 51-52 (2002) ("Ineffective assistance claims . . . appear to incorporate harmless error analysis into the substantive standard.").

112 John Greabe raised a related point in an essay responding to Epps's claim that courts should reconceptualize harmless error rules as restrictions on rights rather than remedies. *See* John M. Greabe, *Criminal Procedure Rights and Harmless Error: A Response to Professor Epps*, 118 COLUM. L. REV. ONLINE 118, 124 (2018) (objecting that Epps's proposal would have an unwelcome effect on how "trial courts . . . rule on motions seeking to enforce [procedural] rights in criminal trials"). Although Greabe cited the trial-level impact of right-restricting prejudice rules as a reason to resist the agenda for doctrinal reform urged by Epps, he did not employ that logic to criticize existing law. *See id.* at 127 (suggesting that *Brady* and effective assistance of counsel—the prototypes for Epps's proposal—"materially differ" from other rights that Epps would define in terms of prejudice, and that *Brady* and *Strickland* "may therefore be defensible"). This Article, by contrast, takes aim at *Brady*, *Strickland*, and other facets of current criminal procedure doctrine.

prejudice cannot be established. Since prejudice-based rights are not violated by nonprejudicial conduct, trial judges are limited in what they can do to prevent or sanction such conduct. In short, prejudice-based rights are not merely "camouflaged harmless error doctrines."[113] They are a distinctive body of law that—unlike the harmless error doctrine—directly shapes how rights get implemented at the trial court level.

### 1. Prejudice-Based Conduct Rules for Nonjudicial Actors

To expand on the first point, using prejudice to define rights affects the conduct rules through which the Constitution guides the behavior of nonjudicial participants in the criminal process. As courts and scholars sometimes overlook, constitutional criminal procedure is comprised not only of "decision rules"—meaning rules "addressed to courts regarding the consequences of unconstitutional conduct"—but also "conduct rules," which "are addressed to [nonjudicial actors] regarding the constitutional legitimacy of their [behavior]."[114] Conduct rules stemming from constitutional rights become far less demanding (and thus less protective for criminal defendants) when courts freight those rights with prejudice requirements.

Take *Brady* as an example.[115] The *Brady* doctrine prescribes a set of conduct rules that regulate what information prosecutors and the police (jointly, "the prosecution team"[116]) must disclose to the defense[117] and, as importantly, *when*

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113 *E.g.*, McCord, *supra* note 111, at 1159–62.

114 Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996). Although Steiker's classic article on the subject states that conduct rules relate to the "investigative practices" of police officers, *id.*, I use the term in a somewhat broader sense that sweeps in any constitutionally derived procedural rules that regulate the behavior of nonjudicial actors. Judicial conduct, by contrast, is regulated by decision rules (not conduct rules) in Steiker's taxonomy, and in this respect, I follow her usage.

115 Like *Brady*, most outcome-centric prejudice-based rights that the Supreme Court has recognized also prescribe conduct rules for nonjudicial actors. *See generally supra* subsection I.B.3. The right to effective assistance of counsel is arguably an exception to this pattern. Generally speaking, the Constitution regulates the conduct of the government and its agents—in other words, it regulates state action. *See generally* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1769 (2010). The Supreme Court's right to counsel cases tend to conceptualize defense lawyers as non-state actors, even when those lawyers are appointed by the state. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 693 (1984) ("The government is not responsible for, and hence not able to prevent, attorney errors . . . ."). *But cf.* Cuyler v. Sullivan, 446 U.S. 335, 343 (1980) ("When a State obtains a criminal conviction through . . . a trial [in which counsel provided ineffective assistance], it is the State that unconstitutionally deprives the defendant of his liberty.").

116 *E.g.*, McCormick v. Parker, 821 F.3d 1240, 1246-48 (10th Cir. 2016). Ensuring that the police communicate all potential *Brady* information to prosecutors (so that prosecutors, in turn, can decide what must be turned over to the defense) is among the key challenges confronting courts and other entities responsible for implementing *Brady*. *See generally* Jonathan Abel, Brady's *Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015).

117 *See generally supra* subsection I.B.1.

they must disclose it.[118] Precisely what those conduct rules demand from the prosecution team depends a great deal on whether *Brady*'s materiality requirement restricts defendants' constitutionally guaranteed right to discovery or, instead, merely limits access to particular remedies for violations of that right.

Suppose, for the moment, that materiality represents a remedial rule—or, to use this Section's nomenclature, a "decision rule"[119]—addressed to reviewing courts, rather than a core ingredient of the underlying due process right. Although this supposition is unconventional,[120] it is hardly fanciful: It has been accepted by a number of lower courts confronted with pretrial *Brady* disputes,[121] and several Supreme Court justices have voiced support for the idea during oral argument.[122] Shorn of the materiality requirement, *Brady*'s conduct rule would presumptively[123] require the prosecution team to disclose all relevant evidence that arguably favors the defense, regardless of whether the evidence has any discernible likelihood of affecting the outcome.[124] Somewhat more controversially, this verison of *Brady* might also obligate the

118 *See* Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 11-15 (2015) (describing various interpretations of *Brady*'s timing requirements).

119 *See* Steiker, *supra* note 114, at 2470.

120 *See infra* notes 127–31 and accompanying text.

121 *See, e.g.*, United States v. Safavian, 233 F.R.D. 12, 16-17 (D.D.C. 2005); *see generally* Hoeffel & Singer, *supra* note 49, at 483-85 (collecting cases that reject applying *Bagley*'s materiality rule to pretrial disclosures).

122 This happened during oral arguments in both *Smith v. Cain*, 565 U.S. 73 (2012), and *Kyles v. Whitley*, 514 U.S. 419 (1995). *See* Hoeffel & Singer, *supra* note 49, at 482-83 (noting that "[f]ive Justices . . . expressed the view that *Brady* requires a prosecutor to disclose pretrial favorable evidence, regardless of materiality" during the oral argument in *Smith*, but that the idea nevertheless "did not make its way into the written opinion"); *id.* at 475 n.40 (describing Justice Scalia's hostile questions aimed at the government's position that *Bagley*'s test for materiality limits what the prosecution must disclose, not just when a reviewing court should reverse based on the prosecution's failure to disclose).

123 This obligation is only "presumptive," for it is subject to exceptions. Even in jurisdictions that authorize relatively broad discovery in criminal cases (whether as a matter of constitutional law or otherwise), the government may seek a protective order allowing nondisclosure if it can establish that disclosure might "endanger the safety of witnesses or the integrity of the investigation." Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 304 (2016).

124 *See, e.g.*, United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199-1201 (C.D. Cal. 1999). The precedential status of *Sudikoff* is currently uncertain. Although footnotes in several Ninth Circuit opinions have approvingly cited *Sudikoff*'s analysis of prosecutors' pretrial obligations under *Brady*, *see, e.g.*, United States v. Olsen, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013), the Ninth Circuit has more recently equated *Brady*'s preconviction standard with its outcome-centric postconviction standard, *see* United States v. Lucas, 841 F.3d 796, 799, 807-09 (9th Cir. 2016).

prosecution team to turn over all disclosable evidence well in advance of trial,[125] perhaps even before entry of a plea.[126]

Yet as discussed in Part I, the notion that materiality solely restricts remedies, as opposed to the *Brady* right itself, sits uncomfortably with the Supreme Court's case law. The Court's decisions in this area suggest, though arguably in dictum, that materiality is not just a remedial or decision rule aimed at courts, but is also a determinant of what evidence criminal defendants are constitutionally entitled to receive from the government.[127] Taking their cues from the Supreme Court, many lower courts have classified materiality as a right-restricting rule,[128] rejecting the remedial conception of materiality that other courts have adopted.[129] Where the right-restricting view of materiality holds sway, *Brady* authorizes the prosecution team to suppress relevant evidence that favors the defense if that evidence is unlikely to change the outcome.[130] And even for potentially outcome-determinative evidence that must be disclosed in the event of a trial, the conventional understanding of *Brady* allows the government to put off disclosing that evidence until the eve of trial (sometimes even midtrial) as long as the delay itself has no probable bearing on the outcome.[131] Because the overwhelming majority of criminal convictions are wrought through pleas, not trials, *Brady*—if construed in the traditional fashion—demands literally nothing in most cases from prosecutors and the police prior to the sentencing stage.

Constitutional law is, of course, not the sole repository of conduct rules that regulate the behavior of nonjudicial actors. In the area of criminal discovery, statutes, court rules, professional ethics standards, and internal prosecutorial guidelines also impose disclosure obligations on the government, and those obligations are sometimes more demanding than the constitutional floor set by the *Brady* doctrine.[132] In particular, all or nearly all

125 *See, e.g.*, United States v. Ford, No. 15-0025(PLF), 2016 WL 482871, at *5 (D.D.C. Feb. 4, 2016) ("A prosecutor's disclosure obligations under *Brady* begin as soon as the case is brought . . . .").

126 The Supreme Court held in *United States v. Ruiz*, 536 U.S. 622 (2002), that *Brady* "does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *Id.* at 633. Lower courts are split about whether *Ruiz*'s holding is limited to impeachment-related *Brady* evidence or whether it encompasses all forms of evidence favorable to the defense. *See* Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 992-95 (2012).

127 *See supra* notes 40–52 and accompanying text.

128 *See, e.g.*, United States v. Coppa, 267 F.3d 132, 135, 139-44 (2d Cir. 2001).

129 *See supra* notes 121–26 and accompanying text.

130 *See, e.g.*, *In re* Sassounian, 887 P.2d 527, 532-33 & nn.5, 7 (Cal. 1995).

131 *See, e.g.*, United States v. Mack, 868 F. Supp. 207, 211 (E.D. Mich. 1994).

132 *See* Turner & Redlich, *supra* note 123, at 302-05 (describing two models adopted by various states that require prosecutors to turn over significantly different amounts of evidence before trial). On occasion, state courts have interpreted due process provisions in their state constitutions to require broader disclosure than the federal Constitution. *See* Stephen P. Jones, Note, *The Prosecutor's*

jurisdictions now have ethics rules that, if interpreted according to their plain meaning, appear to require disclosure of all evidence that favors the defense irrespective of materiality.[133]

Nevertheless, the scope of nonconstitutional conduct rules in criminal procedure can vary substantially from one jurisdiction to the next. That is certainly the case for criminal discovery.[134] And when constitutional doctrine sets a low bar for prosecutorial and police conduct, nonconstitutional regulators often unthinkingly follow suit.[135] For example, some state courts have held that the professional ethics standards governing prosecutorial disclosure mentioned above[136] are "coextensive with the obligations required by *Brady*"[137]—meaning that they, too, implicitly contain a materiality limitation—even though their text lacks any reference to materiality.[138] Using prejudice to define constitutional rights thus not only enervates constitutionally derived conduct rules, but it may indirectly exert downward pressure on parallel nonconstitutional norms as well.

### 2. Prejudice-Based Trial Court Remedies

Where there is no right, there is no remedy.[139] By narrowing the scope of rights, right-restricting prejudice rules also diminish access to remedies. Specifically, such rules limit the power of trial judges to provide remedies—

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*Constitutional Duty to Disclose Exculpatory Evidence*, 25 U. MEM. L. REV. 735, 776-78 & n.210 (1995). Far more commonly, however, state courts march in lockstep with the Supreme Court's *Brady* jurisprudence when addressing disclosure claims arising under state constitutional law. *See, e.g.*, *In re* Sassounian, 887 P.2d at 532-33 & nn.5, 7.

133 The Model Rules of Professional Conduct require a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor" unless a protective order exempts such disclosure. MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 1983). According to Laurie Levenson, who helped spearhead a recent discovery reform initiative in California, all jurisdictions have now adopted "some version of ABA Model Rule 3.8." Laurie L. Levenson, *The Politics of Ethics*, 69 MERCER L. REV. 753, 758 (2018).

134 *See supra* note 31.

135 *See* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 752 (2016) (warning of "federal law's gravitational force on the states").

136 *See supra* note 133 and accompanying text.

137 *E.g.*, *In re* Seastrunk, 236 So.3d 509, 519 (La. 2017); *see also id.* at 517-20.

138 By contrast, other state courts, along with many bar associations, have rejected the idea that *Brady*'s materiality requirement is implicit in their version of Model Rule 3.8(d), "resulting in a significant split of authority" around this issue. Justin Murray & John Greabe, *Disentangling the Ethical and Constitutional Regulation of Criminal Discovery*, HARV. L. REV. BLOG (June 15, 2018), https://blog.harvardlawreview.org/disentangling-the-ethical-and-constitutional-regulation-of-criminal-discovery/ [https://perma.cc/HR3K-L42M].

139 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (highlighting "a general and indisputable rule" that "where there is a legal right, there is also a legal remedy" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23)).

either preventively or as sanctions[140]—for nonprejudicial conduct that implicates, but does not formally violate,[141] the affected rights.

To pick up where the previous subsection ended, *Brady*'s materiality requirement profoundly circumscribes the remedial options available to trial judges with respect to constitutionally required disclosure. If materiality were *not* a right-restricting rule (as some courts hold, but many deny[142]), trial judges would have the power, sometimes even an obligation, to aggressively enforce *Brady* through a variety of mechanisms.[143] To mention just a few examples, judges could implement *Brady* by (1) ordering the government to presumptively[144] disclose all evidence that favors the defense without regard to its likely impact on the outcome;[145] (2) conducting an in camera review of the government's case file to verify compliance;[146] and (3) imposing sanctions for noncompliance.[147]

Conversely, insofar as materiality does restrict the scope of the *Brady* right—as the Supreme Court has suggested, and many lower courts have held[148]—the remedial framework becomes far less robust. Indeed, the first

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140 *See supra* note 27 (defining *remedies* as judicial interventions that either prevent or redress legal wrongs).

141 By definition, nonprejudicial conduct cannot violate a prejudice-based right. *See supra* Section I.A, notes 26–30 and accompanying text. But it is fair to say that such conduct at least *implicates* a prejudice-based right if it meets all the requirements needed to violate the right except for prejudice.

142 *See supra* notes 121–26 and accompanying text.

143 *See, e.g.*, Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 HOFSTRA L. REV. 87, 89 (2017) (proposing "a comprehensive model for proactive judicial management" of *Brady* compliance).

144 *Cf. supra* note 123 (noting that protective orders can partially exempt the government from its presumptive disclosure obligations as to particularly sensitive information).

145 *See generally* Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59 (2017).

146 At least one commentator has argued that trial courts should automatically review the government's file for *Brady* information. *See* Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 426-37 (1984). Alternatively, courts could reserve in camera review for cases where red flags suggest likely noncompliance with the government's disclosure obligations, *see* United States v. Brooks, 966 F.2d 1500, 1504-05 (D.C. Cir. 1992) (summarizing cases in which the judge conducted an in camera review after the defense learned of the existence of undisclosed *Brady* material), or randomly as part of an audit system, *cf. New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1967 (2010) (proposing that police and prosecution agencies conduct discovery audits as a method of self-regulation).

147 Depending on the severity of the violation, permissible sanctions might include (1) for mild violations, a continuance; (2) for intermediate violations, an adverse inference instruction, exclusion of prosecution evidence, a reprimand, or a referral to the bar for potential disciplinary action; and (3) for especially serious violations, a contempt citation, dismissal of the indictment, or even structural remedies directed at the prosecution office itself. *Cf.* Jones, *supra* note 143, at 129-38 (discussing several of these judge-imposed sanctions).

148 *See supra* notes 127–31 and accompanying text.

strategy mentioned above (ordering disclosure unlimited by materiality) is a conceptual nonstarter in jurisdictions that classify materiality as part of the right. After all, judges lack authority to enforce a *materiality-based* disclosure right by ordering broad disclosure *without regard to materiality*.[149] Furthermore, from a practical standpoint, trial-level application of *Brady*'s materiality requirement largely forecloses the second and third strategies listed earlier (in camera review and sanctions, respectively) as well. As I explain more fully elsewhere,[150] materiality is a complex, "fact-intensive"[151] inquiry that judges are both reluctant and ill-equipped to undertake in a pretrial or midtrial posture. To the extent, then, that trial judges must find that evidence is likely to be outcome-determinative as a precondition for ordering the government to disclose it, or for sanctioning nondisclosure, they may succumb to the temptation to simply defer to prosecutors' judgments about materiality and adopt a laissez-faire stance toward the discovery process.

Much like *Brady*'s materiality requirement, *Strickland*'s right-restricting prejudice rule also diminishes the Constitution's trial-level remedial apparatus. In the effective assistance area, my main concern is that *Strickland*'s prejudice requirement thwarts prospective challenges alleging that state-supplied indigent defense systems are structurally deficient. Although these challenges take a variety of forms, many are spearheaded by criminal defendants, individually or as a class, who have not yet been convicted and who allege that their constitutional right to effective assistance of counsel will soon be violated because their attorneys are severely underfunded and saddled with excessive caseloads.[152] Courts often reject such challenges on prejudice grounds.[153] To be sure, prejudice is not the only reason why such claims fail.[154] And in some cases, the challengers have prevailed—in part by successfully arguing that *Strickland*'s prejudice requirement is not right-restricting and, instead, is confined to its native remedial habitat (that is,

149 *See, e.g.*, United States v. Coppa, 267 F.3d 132, 135, 139-46 (2d Cir. 2001); *see also* Serota, *supra* note 49, at 421-31 (critiquing lower federal court decisions in line with *Sudikoff* that reject a materiality standard as contrary to the Supreme Court's *Brady* jurisprudence).

150 *See infra* subsection II.B.1.

151 Wearry v. Cain, 136 S. Ct. 1002, 1007 (2016).

152 *See generally* David Rudovsky, Gideon *and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 LAW & INEQ. 371, 385-408 (2014) (describing ineffective assistance of counsel claims brought by plaintiffs challenging lawyers' excessive caseloads, conflicts of interest, inadequate resources, and more).

153 *See, e.g.*, Platt v. State, 664 N.E.2d 357, 363-64 (Ind. Ct. App. 1996) (refusing to review the plaintiff's Sixth Amendment claim because the plaintiff had had not yet been prejudiced by an unfair trial); *see also infra* notes 157–70 and accompanying text.

154 *See* Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89, 90-98 (2018) (discussing various obstacles confronting prospective Sixth Amendment claims, including the unsuitability of the *Strickland* framework in a preconviction posture, justiciability doctrines, inability to meet the requirements for class certification, and more).

appellate and postconviction review).[155] However, in jurisdictions that adhere to the conventional view that prejudice restricts the scope of the Sixth Amendment right itself,[156] courts generally leave prospective ineffective assistance claimants empty-handed due to their inability to prove prejudice.

A recent case from Utah is representative. In *Cox v. Utah*, two defendants with separately pending criminal cases brought a civil class action, as plaintiffs, on behalf of criminal defendants represented by public defenders in Washington County against the State of Utah, the County, and various officials (collectively, "governmental defendants").[157] They alleged that there was an "imm[i]nent and serious risk" that their right to effective assistance of counsel would soon be violated as a result of gross underfunding for indigent defense and other structural constraints.[158] The governmental defendants filed a motion to dismiss, arguing that the complaint failed to state a claim, the plaintiffs lacked standing, and the claims were not yet ripe.[159]

The court agreed, and dismissed the suit.[160] It noted that "[c]laims of ineffective assistance of counsel are traditionally governed by . . . *Strickland*,"[161] while also acknowledging that under *United States v. Cronic*,[162] "ineffective assistance can be actual or constructive."[163] With respect to *Strickland*, the court deemed the complaint deficient for two reasons. First, *Strickland*'s "two-pronged test" centers on "whether the defendant had the assistance necessary to justify reliance on the outcome of the proceeding," but neither plaintiff's criminal case had been resolved, so "at this point[,] procedurally, neither can state a claim."[164] Second, "even if Plaintiffs were in a procedural posture to assert such claims," "*Strickland* requires proof of actual prejudice," and "there is no showing that any prejudice has been suffered."[165] As for *Cronic*, the court assumed (without deciding) that "a pretrial cause of action for constructive ineffective assistance"

155 *See, e.g.*, Kuren v. Luzerne County, 146 A.3d 715, 743-47 (Pa. 2016) (holding that the *Strickland* test was inapplicable because the plaintiffs were seeking prospective, not postconviction, relief).

156 *See supra* subsection I.B.2.

157 No. 2:16-cv-53-DB, 2016 WL 6905414, at *1 (D. Utah Nov. 7, 2016).

158 Complaint ¶ 102, *Cox*, 2016 WL 6905414 [hereinafter Complaint]; *see also infra* note 243 and accompanying text. The complaint sought declaratory relief, an injunction that would "restrain[] Defendants from violating the [right to counsel guaranteed by the federal and state constitutions]" as well as "requir[e] Defendants to implement a full time indigent defense program on parity with the same programs which the prosecutors and government attorneys have," and an award of fees and costs. Id. at ¶¶ B-E.

159 *Cox*, 2016 WL 6905414, at *3.

160 *See id.* at *3-6.

161 *Id.* at *3.

162 466 U.S. 648 (1984). *Cronic* carved out a narrow exception to *Strickland*'s usual requirement that ineffective assistance claimants must prove a reasonable probability of outcome-determinative prejudice. *See generally supra* note 58 and accompanying text.

163 *Cox*, 2016 WL 6905414 at *3.

164 *Id.* at *5.

165 *Id.* at *6.

might be cognizable in some situations.[166] But the court said that to establish such a claim, the plaintiffs would have to bear the "hefty burden"[167] of showing that "deficient performance [is] widespread and systemic,"[168] resulting in an "aggregate of harm" that is "pervasive and persistent."[169] The complaint did not satisfy that standard, according to the court, since some of the plaintiffs' allegations were too conclusory while others, though "more specific," still "fail[ed] to illustrate how any of the Plaintiffs have been harmed."[170]

*Strickland*'s prejudice prong also occasionally precludes *nonsystemic* ineffective assistance claims, raised before conviction, alleging that defense counsel has furnished deficient representation.[171] This seems to happen infrequently, however. When credible allegations of bad lawyering come to light before entry of judgment, trial judges have the power to appoint substitute counsel without requiring proof of a likely effect on the outcome.[172] So for preconviction ineffective assistance claims predicated on identifiable attorney errors, as opposed to structural defects, it appears that *Strickland*'s right-restricting prejudice rule has had only a limited impact.

But this is cold comfort. Although motions for substitute counsel based on alleged ineffectiveness are commonly raised by indigent defendants, they are greeted with skepticism by judges.[173] And even when they are successful, they do not disrupt the underlying systemic determinants of inadequate attorney performance. Structural deficiencies call for structural remedies,[174]

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166 *See id.* at *4 (acknowledging that other courts have recognized such a claim).

167 *Id.* (quoting Kuren v. Luzerne County, 146 A.3d 715, 740 (Pa. 2016)).

168 *Id.* (citing Duncan v. State, 774 N.W.2d 89, 123 (Mich. Ct. App. 2009)).

169 *Id.* (quoting *Duncan*, 774 N.W.2d at 123-24).

170 *Id.* at *5. The court then held that the plaintiffs lacked standing and that their claims were not ripe, cross-referencing its earlier disposition on the merits. *Id.* at *6.

171 In *United States v. Carmichael*, 372 F. Supp. 2d 1331, 1332 (M.D. Ala. 2005), for example, the defendant asserted before trial that incriminating statements he had made to DEA agents must be suppressed because the statements resulted from ineffectiveness on the part of his lawyer. (The defendant's lawyer had advised him to visit the DEA's office, unaccompanied, to retrieve his seized personal belongings that the DEA was not holding as evidence. *Id.*) The court rejected the defendant's claim as "premature," emphasizing that "the very standard for prevailing on an ineffective-assistance-of-counsel claim appears to preclude such claims prior to an actual conviction." *Id.* at 1333. Because "there is no outcome or result in [the] case yet," the court concluded that "it is impossible . . . to show prejudice as defined by *Strickland* at this stage." *Id.*

172 *See generally* Peter A. Joy, *A Judge's Duty to Do Justice: Ensuring the Accused's Right to the Effective Assistance of Counsel*, 46 HOFSTRA L. REV. 139, 164-69 (2017).

173 *See id.* at 164 & n.186.

174 There is a robust debate—which this Article informs but does not resolve—regarding whether structural reform litigation can achieve meaningful and long-lasting change for underperforming indigent defense systems. *Compare* Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2701-05 (2013) (viewing with cautious optimism the potential impact of structural litigation on indigent defense conditions), *with* Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1788-1803 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL

yet as we have seen, structural remedies are all too often foreclosed by the ineffective assistance doctrine's prejudice requirement.[175]

### B. *The Pitfalls of Ex Ante Prejudice Analysis*

Constitutional criminal procedure is animated by two main objectives: (1) safeguarding the accused against unfair outcomes, and (2) ensuring that outcomes are obtained through a process that is itself fair.[176] Outcome-centric, right-restricting prejudice rules stymie both objectives. Trial judges, prosecutors, and police officers cannot safely predict ex ante whether suppression of evidence, deficient representation by defense counsel, or other deprivations are likely to bring about an unfair outcome in any particular case. And even if they could perform that function in a reliable way, the law generally should not let them, because procedural fairness advances a number of "non-truth-furthering interests" that can still be jeopardized without prejudice to the outcome.[177]

#### 1. Unfair Outcomes

Recall that the Supreme Court's landmark cases about outcome-centric prejudice-based rights reflect an effort to ensure that outcomes are fair to the accused without unduly trenching on countervailing state interests like finality.[178] *Strickland*, for example, asserts that the core "purpose" driving the Sixth Amendment right to counsel is "ensur[ing] a fair trial,"[179] which, according to the Court, means "a trial whose result is reliable."[180] The doctrinal test announced in *Strickland* thus purports to help courts identify and intervene in situations where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[181]

Outcome-centric prejudice-based rights cannot make good on this commitment. It is immensely difficult to predict outcome-determinative prejudice ex ante, before a criminal case has culminated in an outcome.[182] And when the likelihood of prejudice is radically uncertain, as it typically is during

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POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)) (taking a dimmer view of the prospects for indigent defense reform litigation).

175 *See supra* notes 153–70 and accompanying text.

176 *See generally* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1091-95 (1977).

177 Murray, *supra* note 16, at 1795 (internal quotation marks omitted).

178 *See supra* Section I.C.

179 Strickland v. Washington, 466 U.S. 668, 686 (1984).

180 *Id.* at 687.

181 *Id.* at 686.

182 *See infra* notes 187–216 and accompanying text.

the early stages of a prosecution, the accused will lose, since outcome-centric prejudice-based rights assign to the defense the burden of establishing prejudice.[183] Although appellate and (sometimes) postconviction review is theoretically available to scrutinize unreliable first-instance prejudice determinations, that is a woefully inadequate substitute for well-functioning error-prevention mechanisms at the trial level for a host of reasons,[184] not least that the majority of convicted defendants never even file an appeal,[185] and fewer still seek postconviction relief.[186] For these defendants, getting things right the first time is all that matters, since there will not be a second opportunity.

Even under favorable epistemic circumstances, assessing outcome-determinative prejudice is a complex and precarious enterprise.[187] At its core, prejudice analysis involves estimating "the impact of the [potentially prejudicial event] on the minds of other men, not on one's own, in the total setting."[188] Whether the object of inquiry is a plea-bargained outcome,[189] a jury's verdict at trial,[190] or a judge-imposed sentence,[191] the court or other entity evaluating prejudice "must judge others' reactions not by his own, but with allowance for how others might react"[192]—a challenging task that demands a possibly unrealistic level of intersubjective understanding.[193] Moreover, prejudice analysis has to look at the totality of the circumstances, since the outcomes of criminal cases ordinarily stem from diverse causal

183 *See, e.g.*, *Strickland*, 466 U.S. at 696; *see also infra* note 224 and accompanying text.

184 *See infra* notes 217–26 and accompanying text.

185 *See* Nancy J. King, *Appeals*, *in* 3 REFORMING CRIMINAL JUSTICE, *supra* note 31, at 254-55.

186 *See* Nancy J. King, *Enforcing Effective Assistance after* Martinez, 122 YALE L.J. 2428, 2438-42 (2013).

187 Indeed, Chief Justice Traynor of the California Supreme Court viewed one common form of outcome-centric prejudice analysis (harmless error review) as the "most pervasive and elusive of all problems" confronted by appellate courts. ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 4 (1970).

188 Kotteakos v. United States, 328 U.S. 750, 764 (1946).

189 *See, e.g.*, Hill v. Lockhart, 474 U.S. 52, 57-60 (1985).

190 *See, e.g.*, *Kotteakos*, 328 U.S. at 758-77.

191 *See, e.g.*, Glover v. United States, 531 U.S. 198, 203-04 (2001).

192 *Kotteakos*, 328 U.S. at 764.

193 *Compare* Lee E. Teitelbaum et al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1173-76 (finding that judges' and lawyers' estimates of the potential prejudice associated with various kinds of evidence in survey responses diverged substantially from laypersons' estimates), *with* D. Alex Winkelman et al., *An Empirical Method for Harmless Error*, 46 ARIZ. ST. L.J. 1405, 1423 (2014) (finding that laypersons' reactions to vignettes loosely derived from the fact patterns of several published harmless error decisions had "some correspondence to the harmless error determinations made by real courts"). Available evidence suggests that assessments of outcome-determinative prejudice are especially erratic and unreliable in connection with the penalty phase of capital trials, where the stakes could not possibly be higher. *See, e.g.*, Kamin, *supra* note 111, at 62-63 (finding, based on a review of death penalty decisions by the California Supreme Court between 1976 and 1996, that during this period "the reversal rate in capital cases dropped from 94% to 14%" and that the court's "differential use of the harmless error doctrine" accounted for "nearly all of the difference in death penalty outcomes").

factors that *collectively* persuade the relevant decisionmaker, not a single item of evidence or other factor considered in a vacuum.[194] Assessing prejudice is therefore a "fact-intensive" process that requires a large investment of scarce time and attention to do properly—an investment that courts and other actors are not always willing or able to make.[195]

What sort of information would we need in order to calculate outcome-determinative prejudice in an accurate manner? Ideally, we would have *direct evidence* revealing the factors that determined or will determine the outcome. By way of example, direct evidence of prejudice can include: (1) for a plea-bargained outcome, credible testimony by the defendant regarding why she or he opted to plead guilty or go to trial;[196] (2) for a jury verdict, notes the jury may have submitted to the trial court revealing how it viewed the facts;[197] or (3) for a sentence imposed by a court, the reasons the court articulated to justify that sentence.[198] Often, however, little or no direct evidence relating to prejudice is available, and the best we can hope to have is *circumstantial evidence* tending to show how a reasonable person in the decisionmaker's position would act.[199] The most common forms of circumstantial evidence courts cite in connection with prejudice analysis are the persuasiveness of the prosecution's case (either as to guilt or to the appropriate sentence) and whether the potentially prejudicial event substantially strengthens the prosecution's hand.[200]

Just as importantly, the integrity of prejudice analysis depends on objective evaluation. Even if there are compelling reasons to suspect that prejudice will occur or has occurred, that conclusion might not carry the day

194 *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 695-96 (1984).

195 Wearry v. Cain, 136 S. Ct. 1002, 1007 (2016).

196 *See, e.g.*, Lee v. United States, 137 S. Ct. 1958, 1966-68 (2017). *But see id.* at 1967 (cautioning that "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded" and "should instead look to contemporaneous evidence").

197 *See, e.g.*, United States v. Varoudakis, 233 F.3d 113, 126-27 (1st Cir. 2000).

198 *See, e.g.*, Molina-Martinez v. United States, 136 S. Ct. 1338, 1345-49 (2016).

199 *See, e.g.*, Harrington v. California, 395 U.S. 250, 254 (1969).

200 *See, e.g.*, Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Scholars dispute whether and to what extent courts examining outcome-determinative prejudice should consider the strength of the prosecution's untainted evidence against the defendant. *See generally* Murray, *supra* note 16, at 1800-05 (summarizing the debate and explaining my own perspective on this issue). But judges generally treat "the strength of the case against the defendant" as "[p]erhaps the single most significant factor" when calculating the probability of prejudice. 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 854 (4th ed. 2019).

if the inquirer has vested interests[201] or cognitive biases[202] clouding his or her judgment. Whenever possible, the law should make judges—not prosecutors or other interested parties—responsible for estimating the likelihood of prejudice to the outcome.[203]

To generalize from this discussion, detecting outcome-determinative prejudice depends on *access to probative information* and *objectivity in evaluating that information*. When prejudice is evaluated ex ante, as outcome-centric prejudice-based rights require, the first of these criteria (access to information) is not met. And some outcome-centric prejudice-based rights, such as *Brady*, flunk the second criterion (objectivity) as well.

Most fundamentally, the information one would need to accurately measure prejudice is rarely known before trial court proceedings have concluded. Direct evidence of outcome-determinative prejudice almost never exists during the early stages of a criminal case and usually emerges, if at all, only at trial, at a sentencing hearing, or during a subsequent postconviction proceeding.[204] Circumstantial evidence of prejudice is also in short supply when cases first commence, though such evidence tends to accumulate as cases move through later stages of the criminal process. For cases that get tried, the trial itself may provide a wealth of data—including the facts introduced by each side,[205] opening statements,[206] closing arguments,[207] jury notes,[208] and so on—that lessens the uncertainty inherent in attempting to discern "the impact of [a potentially prejudicial event] on the minds of other men."[209] But a vanishingly small fraction of criminal cases culminate in a

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201 *See, e.g.*, Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129, 140-41 (Carol S. Steiker ed., 2006) (arguing, with respect to *Brady*, that "even if [prosecutors] see that . . . evidence is exculpatory, they may not see how it is material" because the "traditions, culture, and incentives of our adversarial system" encourage them to "have favorable win–loss records and rack up many convictions").

202 *See, e.g.*, Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 190-91 (2016) (examining how hindsight bias and other cognitive errors can distort prejudice analysis to defendants' disadvantage).

203 That said, even courts are influenced by incentives (like preserving finality, *see supra* Section I.C) and psychological impediments (like hindsight bias, *see, e.g.*, Griffin, *supra* note 202) that can detract from their capacity to reliably gauge prejudice.

204 *See supra* notes 196–200 and accompanying text.

205 *See supra* note 200 and accompanying text.

206 *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 297 (1991).

207 *See, e.g.*, Chapman v. California, 386 U.S. 18, 24-26 (1967).

208 *See supra* note 197 and accompanying text.

209 Kotteakos v. United States, 328 U.S. 750, 764 (1946); *see also supra* notes 187–95 and accompanying text. However, crucial information bearing on prejudice is often missing even when a trial has occurred. For instance, the trial record that gets reviewed by an appellate or postconviction court is a "cold record" stripped of potentially relevant information—especially demeanor evidence—that might have mattered to the factfinder. *E.g.*, Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1169 (1995). *But*

trial.[210] In cases resolved through plea deals—in other words, the vast majority of cases that end in a conviction—a judge or other actor evaluating prejudice in an ex ante posture usually has only meager information regarding both sides' potential theories of the case and the facts supporting each theory. And even with respect to the few cases that do go to trial, key decisions concerning prejudice (such as prosecutors' assessments of materiality under *Brady*) sometimes take place before trial, without the benefit of whatever prejudice-related data the trial later generates.[211]

Courts have intermittently recognized these informational obstacles to evaluating prejudice ex ante—and cited them as reasons to avoid even trying to enforce outcome-centric prejudice-based rights in a preventative mode. In several of its cases concerning "constitutionally guaranteed access to evidence,"[212] for example, the Supreme Court has remarked that "determinations of materiality are often best made in light of all of the evidence adduced at trial" and thus that "judges may wish to defer ruling on [materiality] until after the presentation of evidence."[213] In a similar vein, in the effective assistance of counsel context, some lower courts have rejected prospective claims on the ground that such claims "are not reviewable . . . [because] we have no proceeding and outcome from which to base our analysis."[214]

To make matters worse, some outcome-centric prejudice-based rights entrust the task of assessing prejudice to nonjudicial decisionmakers who lack the neutrality to do the job properly. *Brady* doctrine, for example, relies on the prosecution team to make the first—and usually, the last—assessment of what evidence the government can suppress without prejudicing the outcome, as well as how long the government can postpone disclosing potentially outcome-determinative evidence before the delay itself is likely to affect the outcome.[215] Prosecutors and police officers, however well-intentioned, approach these questions as interested parties whose priors are naturally colored by their

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*see* Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991) (questioning the accuracy of demeanor evidence in evaluating witness credibility).

210 *See* Jenia I. Turner, *Plea Bargaining*, *in* 3 REFORMING CRIMINAL JUSTICE, *supra* note 31, at 73 & n.2.

211 Although prosecutors have a "continuing obligation" to ensure the completeness of their *Brady* disclosures as new information comes to light, *e.g.*, Whitlock v. Brueggemann, 682 F.3d 567, 588 (7th Cir. 2012), prosecutors' incentives and biases may deter them from revisiting their initial evaluations of materiality, *see* Baer, *supra* note 118, at 31-43.

212 United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

213 *Id.* at 874; *see also* United States v. Marion, 404 U.S. 307, 3-26 (1971) (holding that the prosecution's delay in indicting the defendant did not warrant dismissal because any claim of prejudice would be "speculative and premature" until "[e]vents of the trial . . . demonstrate actual prejudice").

214 Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996); *see also supra* notes 153–71.

215 *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached.").

professional role "in the often competitive enterprise" of enforcing the criminal law.[216] They should not be in the business of deciding what evidence favors the defense strongly enough to create a reasonable probability of an acquittal or a reduced sentence—and to suppress defense evidence that, in their view, does not meet that high threshold.

Finally, we cannot depend on appellate and postconviction courts to set things right when outcome-centric prejudice-based rights misfire at the trial court level.[217] Although reviewing courts conducting prejudice analysis after the fact often have better information to work with than do trial judges endeavoring to anticipate prejudice ex ante,[218] their efforts are handicapped by the fact that just a fraction of convicted defendants challenge their convictions or sentences on appeal,[219] and an even smaller proportion pursue postconviction review.[220] Needless to say, reviewing courts cannot rectify prejudicial errors that defendants do not bring to their attention.[221] Moreover, even when defendants who have well-founded claims of prejudicial error do seek appellate or postconviction relief, there is a risk that courts reviewing

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216 *Cf.* Johnson v. United States, 333 U.S. 10, 13-14 (1948) ("The point of the Fourth Amendment . . . consists in requiring that [factual] inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."). As other scholars have persuasively argued, prosecutors' adversarial function requires them to construct a theory of guilt, which "trigger[s] cognitive biases[] such as confirmation bias and selective information processing" that diminish their ability "to see materiality where it might in fact exist." Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1611-12 (2006).

217 Indeed, we now know—through empirical work on wrongful convictions—that reviewing courts often cite a lack of outcome-determinative prejudice as a reason to reject claims under *Brady*, *Strickland*, and other procedural rights even in cases involving innocent defendants who were subsequently exonerated. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 107-09 (2008) (analyzing 133 written rulings in cases where people were subsequently exonerated through postconviction DNA testing).

218 *See supra* notes 204–09 and accompanying text. That said, ex post prejudicial analysis suffers from several offsetting disadvantages when compared with ex ante assessment, including the lack of postconviction counsel, *see infra* note 221, the heavy incentive to affirm for the sake of finality, *see supra* note 203, and hindsight bias, *see id.*

219 *See supra* note 185.

220 *See supra* note 186.

221 There are all kinds of reasons why defendants—even those who have been wrongfully convicted or sentenced—might not pursue appellate and postconviction review. *See, e.g.*, Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 692-95 (2007). Many defendants, especially those serving relatively short sentences, are deterred by the prolonged delays that appellate and postconviction litigation entail. *See id.* at 693-94. Others have no access to counsel (at the postconviction stage) and are not in a position to go at it alone. *See id.* at 692-94. And some defendants simply lack knowledge about the errors that might support a claim for relief—particularly when the type of error in question is the suppression of *Brady* evidence, which is by nature hidden from view unless and until the concealed evidence is fortuitously discovered. *See* Bennett L. Gershman, *Litigating* Brady v. Maryland, 57 CASE W. RES. L. REV. 531, 536-37 (2007).

those claims will reject them anyway due to deficient pleading or briefing (especially at the postconviction stage, where most defendants have to proceed pro se[222]), incentives to preserve finality,[223] the stringent burden of proof that defendants must satisfy under *Bagley*, *Strickland*, and related cases,[224] and other reasons.[225]

In law as in life, prevention is the best medicine.[226] If procedural law is set up to fail on the front end, there is only so much that reviewing courts can do to clean up the mess retrospectively.

### 2. Unfair Process

Achieving fair outcomes is perhaps the single most important function of criminal procedure. But that is not its sole function. In its better moments, criminal procedure also aspires to protect "a diverse array of 'non-truth-furthering' interests—interests that include providing defendants with space for autonomous decisionmaking, enforcing compliance with antidiscrimination norms, and making transparent the inner workings of criminal justice—in addition to 'truth-furthering' objectives."[227] So even in cases where a defendant's guilt and merited sentence are not seriously open to question, and the correct outcome is readily apparent, the key ingredients of a fair process should extend to the "innocent and guilty alike."[228]

Outcome-centric prejudice-based rights are at odds with this principle. By defining prejudice solely in terms of the outcome, these rights obscure other forms of harm—involving non-truth-furthering interests—that can also result when the criminal process is unfair. For instance, when a prosecutor knowingly suppresses evidence that is favorable under *Brady*, the defendant is deprived of a full opportunity to prepare and present his or her defense, and societal interests—relating to transparency and checks and balances—may be compromised as well.[229] Likewise, when an indigent defendant's

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222 *See supra* note 221.

223 *See supra* note 203.

224 *See infra* notes 284–85 and accompanying text.

225 *See, e.g.*, *supra* notes 202–03 (discussing hindsight bias).

226 The Supreme Court captured this idea nicely in *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), where it stated that "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." Or as Benjamin Franklin famously wrote, "an Ounce of Prevention is worth a Pound of Cure." PA. GAZETTE, Feb. 4, 1735, at Numb. 322 (published anonymously).

227 Murray, *supra* note 16, at 1795 (quoting, respectively, Stacy & Dayton, *supra* note 100, at 94, and Cover & Aleinikoff, *supra* note 176, at 1092) (footnotes omitted). I acknowledge, of course, that the criminal justice system's commitment to these goals is inconstant, and often gives way when competing interests assert themselves. *Cf. supra* Section I.C; *see generally* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 187-89 (2014).

228 *E.g.*, Rea v. United States, 350 U.S. 214, 217 (1956).

229 *See infra* notes 233–41 and accompanying text.

court-appointed lawyer is grossly ineffective, the defendant's opportunity to be heard (whether through counsel or otherwise) is hampered, and our collective commitment to equal justice for the rich and the poor is degraded.[230] In each example, unfair processes (evidence suppression or deficient representation, respectively) cause harm both to the defendant and to various public goods, and they do so regardless of whether the defendant is guilty or whether the unfairness might affect the outcome.[231] Yet outcome-centric prejudice-based rights do not recognize—and thus fail to adequately guard against—the harms associated with procedural unfairness in cases where the outcome is not on the line.

First consider *Brady*. As discussed earlier, *Brady*'s materiality inquiry centers on whether an unfair procedural event (specifically, the government's suppression of evidence that favors the defense) might influence the outcome.[232] That inquiry fails to account for any non-truth-furthering interests that may be harmed by evidence suppression. Are there any such interests? I believe there are.

One is the accused's autonomy interest in preparing and presenting a defense.[233] A defense—whether it relates to liability or the appropriate sentence—has to be stitched together from facts that lend it plausibility. Those facts, however, frequently lie in the possession of the government due to its superior investigative resources and other advantages.[234] So when the government fails to disclose facts that favor a potential defense, the defendant might choose not to present that defense—deterred by the apparent absence of supporting facts—opting instead for some other (perhaps less viable) theory or, in many instances, no theory at all.[235] Silencing criminal defendants

230 *See infra* notes 242–64 and accompanying text.

231 Needless to say, the accused and the community as a whole both suffer an additional—and more severe—harm when procedural unfairness results in an unfair outcome. But this does not undercut my point that unfair processes can cause serious harm even when the outcome is unaffected.

232 *See supra* notes 43–44 and accompanying text.

233 *See* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1187 (2010) (describing and arguing in support of "the criminal defendant's autonomy interest . . . to control the presentation of his defense").

234 *See, e.g.*, David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1731-48 (1993). This is not to say that prosecutors have access to ample resources; in many jurisdictions, they do not. *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266-79 (2011). But as between indigent defendants—which is to say, *most* criminal defendants—and prosecutors, working in close coordination with the police, it is clear which side holds the relative advantage. *See, e.g.*, Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 230-42 (2004).

235 Defendants generally know, of course, whether or not they committed the charged crime, and they have a right to testify on their own behalf. But unless defendants can corroborate their accounts with supporting evidence, factfinders tend to doubt the credibility of their testimony, and many defendants—realizing this—are understandably reluctant to provide it. *See, e.g.*, Theodore

in this fashion is injurious in and of itself, even if there is nothing the defendant or defense witnesses could say that might persuade the factfinder to acquit or to reduce the defendant's sentence.[236]

The suppression of favorable evidence by the government also threatens the public's interest in a transparent criminal process that has the capacity to hold executive power in check.[237] When favorable evidence gets disclosed, the defense then has the option to communicate that evidence to judges, juries,[238] and the broader community, setting in motion various mechanisms for maintaining governmental accountability.[239] Conversely, when the government conceals such evidence, it keeps these stakeholders in the dark and undermines their supervisory functions.[240] In a plea-dominated system characterized by vast prosecutorial discretion and minimal public awareness and engagement, it is dangerous to stack the deck further by permitting the government to hide evidence that favors the defense.[241]

The *Strickland* doctrine and its prejudice requirement are vulnerable to an analogous critique. Let us begin by revisiting *Cox v. Utah*—a case introduced earlier in which a putative class of defendants facing as-yet-unresolved criminal charges brought a civil action as plaintiffs challenging the indigent defense system in Washington County, Utah.[242] The complaint alleged, in a nutshell, that the defendants' right to effective assistance of counsel was "in imminent danger of being violated because the indigent defense program . . . lacks 'sufficient funding, sufficient attorney and professional staff, training, workload limits, adequate contracting standards, [and] adequate attorney

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Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357 (2009).

236 *See generally* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1475-1504 (2005).

237 *Cf.* Kyles v. Whitley, 514 U.S. 419, 439-40 (1995) (encouraging, though not requiring, prosecutors to presumptively disclose all favorable evidence irrespective of its probable effect on the outcome, reasoning that "[s]uch disclosure will serve to justify trust in the prosecutor" and to "preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations").

238 *See* Jason Kreag, *The Jury's* Brady *Right*, 98 B.U. L. REV. 345, 395 (2018) (arguing that the suppression of favorable evidence by the government harms not only defendants, but also "individual jurors and the institution of the jury").

239 Even where defendants opt to plead guilty (as is obviously the norm) instead of going to trial, the disclosure of favorable evidence gives the defense some leverage in plea negotiations with the prosecution, generating at least a limited constraint on prosecutorial power. And whether the defendant pleads guilty or chooses to go to trial, he or she may present favorable evidence during the sentencing hearing.

240 *See* Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 333-39 (2019) (discussing *Brady*'s importance in validating the interests of jury members, victims, and the broader political community).

241 *See generally* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006).

242 *See supra* note 157 and accompanying text.

qualification standards.'"[243] The court tossed the suit at the pleading stage mainly because the plaintiffs could not show that the county's allegedly defective indigent defense scheme would cause outcome-determinative prejudice in their separately pending criminal prosecutions.[244]

This analysis overlooks that the right to counsel serves a number of different functions in our quasi-adversarial[245] justice system, functions that cannot be reduced to the single dimension of how counsel's assistance might influence case outcomes.[246] For one thing, as the Supreme Court recognized in *Powell v. Alabama*, the assistance of counsel is a vital aspect of the defendant's "right to be heard," which "would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[247] This right to be heard, according to *Powell*, is "among the immutable principles of justice"[248] that must be afforded to all defendants, "[h]owever guilty [they] might prove to have been."[249] Moreover, certain facets of right to counsel doctrine—in particular, *Gideon*'s guarantee of court-appointed counsel for (some[250]) indigent defendants—reflect the principle that "every defendant stands equal

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243 Cox v. Utah, No. 2:16-cv-53-DB, 2016 WL 6905414, at *2 (D. Utah Nov. 7, 2016) (quoting Complaint, *supra* note 158, ¶ 38). Among other things, the plaintiffs asserted that: (1) defense attorneys contracting with the governmental defendants toiled under "unmanageably large workloads," Complaint ¶ 78, and many of them "rarely, if ever, investigate[d] the charges" against their clients, *id.* ¶ 71, as evidenced by the fact that the lawyer for one of the named plaintiffs was responsible for at least 350 cases, roughly eighty percent of them felonies, *id.* ¶ 43; *see also id.* ¶ 85 (alleging that two former public defenders each closed over 350 felonies in FY 2015); (2) the indigent defense program was seriously underfunded, *see id.* ¶¶ 87-91, since Washington County allocated only $760,688 for the defense program while budgeting $2,816,540 for prosecutions, *id.* ¶¶ 8-10, so some lawyers would "rely solely on police detective work, or forego legal research and factual investigations necessary for constitutionally adequate legal representation," *id.* ¶ 91; and (3) the governmental defendants would "hire, award contracts to, or appoint attorneys who have neither the experience, inclination, nor resources to provide adequate legal representation," *id.* ¶ 48, and who "will not challenge the county attorney by advocating vigorously for their clients," *id.* ¶ 51.

244 *See supra* notes 160–70 and accompanying text.

245 *Cf.* Jennifer E. Laurin, *Quasi-Inquisitorialsim: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 811 (2014) (analyzing components of the contemporary criminal justice system that "are more resonant with institutional and professional attributes of Continental, inquisitorial systems of criminal justice than the traditional conception of the American system").

246 *See generally* Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986).

247 287 U.S. 45, 68-69 (1932). *Powell* was the Court's first major decision concerning the constitutional right of indigent defendants to receive court-appointed counsel, though the case arose under the Fourteenth Amendment rather than the Sixth since the latter had not yet been applied to the states. *See generally* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

248 *Powell*, 287 U.S. at 68.

249 *Id.* at 52.

250 *See supra* note 53 (explaining that the guarantee of court-appointed counsel does not apply in misdemeanor prosecutions that do not result in imprisonment).

before the law."[251] That principle "cannot be realized," as *Gideon* explains, "if the poor man charged with crime has to face his accusers without a lawyer to assist him" while others are able to "hire the best lawyers they can get to prepare and present their defenses."[252] And finally, criminal procedure's "detailed regulatory system" for holding governmental power in check "depends for its enforcement on criminal defense counsel, the private attorneys general of the Fourth, Fifth, and Sixth Amendments."[253] Without an "adequate level of litigation by . . . defense counsel," that regulatory system collapses.[254]

All of these objectives are undermined where, as was alleged in *Cox*, the government's indigent defense delivery system is structurally unsound.[255] If the *Cox* plaintiffs were correct that—due to underfunding and other systemic constraints—many indigent defense lawyers in Washington County "rarely, if ever, investigate[d] the charges"[256] and "regularly fail[ed] to devote sufficient time to interviewing and counseling" their clients,[257] we could hardly expect those lawyers to vindicate their clients' "right to be heard" in the manner envisioned by *Powell*.[258] To the contrary, defense lawyers operating under such conditions risk becoming complicit in a dehumanizing system of "assembly line justice" that rushes clients en masse into plea deals without meaningfully considering their particular circumstances.[259] Likewise, if the County awarded defense contracts to "attorneys who have neither the experience, inclination, nor resources to provide adequate legal representation to indigent clients," as the putative class of criminal defendants alleged,[260] its attorney appointment

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251 Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

252 *Id.*; *see also* Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1220-40 (2013) (discussing indigent defendants' right to equal access to the courts). In some respects, however, Sixth Amendment doctrine privileges the right to choose one's own counsel—a right that is in effect off the table for most indigent defendants—over the right to a reasonably effective court-appointed lawyer for defendants who lack the means to hire counsel. *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140, 145-52 (2006) (holding that prejudice is not required to establish a Sixth Amendment violation when a court intrudes on a defendant's prerogative to retain a lawyer he or she chooses).

253 William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 19-20 (1997).

254 *Id.* at 12; *accord* United States v. Cronic, 466 U.S. 648, 653 (1984) (noting that the right to counsel is "a fundamental component of our criminal justice system" as it enables a defendant to assert any other rights he or she may have).

255 *See supra* notes 242–43 and accompanying text.

256 Complaint, *supra* note 158, ¶ 71.

257 *Id.* ¶ 70.

258 *See* Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (describing the "right to be heard" as involving "the guiding hand of counsel at every step in the proceedings against him [or her]" because, without such involvement, a layperson may lack the skill or knowledge to mount a serious defense).

259 *E.g.*, Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 148 (1986).

260 Complaint, *supra* note 158, ¶ 48.

scheme could not possibly ensure, in *Gideon*'s words, that "every defendant stands equal before the law."[261] Furthermore, insofar as the lawyers appointed by the County were "unable to act as an effective adversarial check upon the prosecution,"[262] they ceased to function as the "private attorneys general" on which our system of criminal procedure "depends for its enforcement."[263] Yet the court in *Cox* failed to take these concerns seriously, echoing the Supreme Court's own disinclination—displayed in *Strickland* and other ineffective assistance cases—to do anything about deficient representation that does not result in outcome-determinative prejudice.[264]

I do not claim that outcome-centric prejudice-based rights afford zero protection for non-truth-furthering interests. As I have explained in a previous article, in connection with the harmless error doctrine, outcome-centric prejudice rules provide some refuge for non-truth-furthering interests to the extent that both of two conditions are met.[265] First, the non-truth-furthering interest must be "result-correlated," meaning that the interest is likely to be impaired in situations where the result is affected, but unlikely to be harmed otherwise.[266] Second, the entity evaluating prejudice must be able to reliably determine whether the outcome will be or has been affected, since that question is the proxy by which outcome-centric prejudice rules indirectly secure non-truth-furthering interests that are result-correlated.[267]

Although outcome-centric prejudice rules do provide some incidental protection for criminal procedure's non-truth-furthering interests, they were not designed with that function in mind.[268] And they are not much good at it, either. Regarding the first condition mentioned above (result-correlation), the non-truth-furthering interests that are jeopardized by evidence suppression and deficient representation are only partly result-correlated.

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261 Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

262 Complaint, *supra* note 158, ¶ 92.

263 Stuntz, *supra* note 253, at 19-20.

264 *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 697 (1984) ("The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

265 *See* Murray, *supra* note 16.

266 *Id.* at 1814 (defining result-correlated interests and distinguishing them from "*result-independent interest*[*s*], . . . for which there is no strict correlation between the degree to which an error harms the . . . interest and the likelihood that the error affected the result"). For instance, the privacy interest safeguarded by the Fourth Amendment's exclusionary rule is "a non-truth-furthering interest that is heavily result-correlated," since pro-prosecution errors "cause harm to that interest only to the degree that they enhance the probability of conviction." *Id.* at 1815.

267 *See id.* at 1814-15.

268 *See, e.g.*, *Strickland*, 466 U.S. at 691-92 (deriving the prejudice requirement for ineffective assistance of counsel claims partly from "[t]he purpose of the Sixth Amendment guarantee of counsel . . . to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding").

This is especially true in cases where the prosecution's evidence against the defendant is overwhelming (or is *perceived* to be so by the relevant decisionmaker)—a circumstance that renders nonprejudicial "almost any error, even those that gravely compromise the fairness of the proceeding."[269] As for the second condition (reliable evaluation), outcome-centric prejudice-based rights get a failing grade for the reasons articulated earlier.[270] Outcome-centric, right-restricting prejudice rules are thus incompatible with the basic principle that every criminal defendant is entitled to a fair process regardless of his or her guilt or innocence.

## III. PATHS FORWARD

This Part proposes an agenda for doctrinal reform targeted at the *Brady* rule, effective assistance of counsel, and potentially other outcome-centric prejudice-based rights.[271] The agenda has two complementary components. The first involves extricating prejudice from the definition of procedural rights and classifying it as a remedial question—in short, moving prejudice from rights to remedies. The goal behind this part of my proposal is to allow consideration of prejudice in the remedial contexts where its justifications are strongest, including appellate and postconviction review, while circumscribing prejudice analysis at the trial court level where finality is not at stake. The second component involves redefining what the law means by prejudice. As explained in Part II, procedural unfairness can cause harm to non-truth-furthering interests—such as defendants' autonomy interest in having a meaningful opportunity to be heard, or society's interest in transparency—even in cases where the outcome is not affected.[272] Outcome-centric tests for prejudice ignore such harm. The alternative framework I propose, called *contextual harmless error review*, would put an end to that.[273]

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269 Murray, *supra* note 16, at 1820 (arguing that "result-based harmless error review bears the potential to systematically deprive redress for result-independent, non-truth-furthering interests in cases where the evidence of guilt is overwhelming").

270 *See supra* subsection II.B.1.

271 *See supra* note 14 (explaining the reason for this qualifier).

272 *See supra* subsection II.B.2.

273 Some commentators would prefer to go further than this with respect to some prejudice-based constitutional rights—or *all* constitutional rights—by eliminating prejudice analysis at the appellate and postconviction stages, thereby requiring automatic reversal irrespective of prejudice. *See, e.g.*, Abbe Smith, Strickland v. Washington: *Gutting* Gideon *and Providing Cover for Incompetent Counsel*, *in* WE DISSENT 188, 200 (Michael Avery ed., 2009) (proposing automatic reversal for ineffective assistance of counsel); David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483, 483 (2000) (proposing automatic reversal for all constitutional errors). Although there is much to be said in favor of automatic reversal, especially in connection with ineffective assistance of counsel, I am reluctant to go down that road due to the risk of "remedial deterrence," *see* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889 (1999) (arguing that "raising the 'price' of a constitutional violation by enhancing the

### A. *Moving Prejudice from Rights to Remedies*

The central ingredient of my proposal is to move prejudice from rights to remedies. Specifically, I argue that courts should eliminate prejudice from the definition of *Brady*, effective assistance of counsel, and possibly other outcome-centric prejudice-based rights, but permit consideration of prejudice in connection with those rights in discrete remedial contexts.[274] Courts may properly consider prejudice when a convicted defendant seeks the remedy of reversal via appellate or postconviction review. Generally speaking, however, prejudice should play a far more limited role when trial judges, prosecutors, or police officers are applying those rights in the first instance, or when judges are asked to remedy rights violations before a defendant has been convicted or sentenced.[275]

The selling point of this idea has to do with how it would impact the administration of procedural law at the trial court level. As explained in Part II, the deepest problems associated with outcome-centric, right-restricting prejudice rules stem from the fact that they demand consideration of prejudice not just in appellate and postconviction litigation, as is routine, but also before trial court proceedings have culminated in a judgment.[276] Relocating prejudice from rights to remedies would address those problems at their root. For it would make clear that no one—neither trial judges, nor prosecutors and police officers—may cite lack of prejudice as an excuse for

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remedy" will "result in fewer violations" and a "par[ing] back [of] the constitutional right"), and for other reasons I have discussed previously. *See* Murray, *supra* note 16, at 1806-10.

274 For purposes of this Section (but not Section III.B, below), I am assuming a fixed definition for prejudice—whatever definition the law currently supplies. *See supra* Section I.B (describing the existing legal framework). So for *Brady*, prejudice means "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.). Similarly, for the right to effective assistance of counsel, prejudice refers to "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984).

275 There are exceptional situations in which it would be appropriate, under the framework I propose, to consider prejudice at the trial court level. But these exceptions prove the rule. Most obviously, a trial judge would still be expected to assess prejudice, as under current law, when disposing of new trial motions or other motions that, similar to an appeal, challenge a defendant's conviction or sentence after the fact. *See, e.g.*, United States v. Harrington, 410 F.3d 598, 601 (9th Cir. 2005). A trial judge would take prejudice into account—though not necessarily under the same doctrinal test as would apply in an appellate or postconviction proceeding—when deciding whether a particular remedy is a proportionate response to a procedural error. To offer an extreme example, a trial judge ordinarily could not dismiss an indictment with prejudice as a sanction for nonprejudicial errors. *See, e.g.*, United States v. Morrison, 449 U.S. 361, 364-67 (1981).

276 *See supra* Section II.A. This is troubling because, to recap a bit, (1) prejudice to the outcome can rarely be predicted with reliability ex ante, *see supra* subsection II.B.1, and (2) outcome-centric prejudice analysis is insensitive to non-truth-furthering interests that criminal procedure ought to protect, *see supra* subsection II.B.2.

depriving defendants of their rights in the first instance, or as a categorical bar to providing ex ante relief for rights violations.

Regarding *Brady*, moving prejudice from rights to remedies would obligate the government to disclose all evidence that favors the defense (absent a protective order[277]), forbidding the suppression of favorable evidence that prosecutors and police officers deem unlikely to affect the outcome.[278] This reform, moreover, would not only require the government to disclose more evidence. It would also require the government to turn over all disclosable evidence more expeditiously than current doctrine demands, as the timing of disclosure would no longer be tied to prejudice (or more precisely, *materiality*).[279] And finally, modifying *Brady* along the lines suggested here would also empower trial judges to enforce constitutional disclosure law through pretrial discovery orders, in camera inspection of the government's evidence, and—if the government flouts its disclosure duties—sanctions.[280]

Regarding effective assistance of counsel, my proposal would invigorate structural reform litigation targeted at failing indigent defense systems. *Strickland*'s prejudice requirement, conceptualized as a right-restricting rule, has been a thorn in the side of prospective indigent defense litigation for decades, for it has prompted courts to reject otherwise promising prospective claims as either premature (since prospective claims by definition arise before there is an outcome that could be prejudiced) or unduly speculative (since it is hard to figure out, ex ante, what will affect the outcome or not).[281] Taking prejudice out of the definition of the right to effective assistance of counsel would remove these obstacles.[282]

Moving prejudice from rights to remedies would not, however, significantly alter how courts conduct prejudice analysis at the appellate and postconviction stages. As noted earlier, reviewing courts operating within my proposed framework would still evaluate prejudice—as a matter of remedial law—before reversing a trial court judgment.[283] Some scholars will likely see

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277 *See supra* note 123.

278 *See supra* notes 121–24 and accompanying text.

279 *See supra* notes 125–26 and accompanying text. As discussed earlier, the conventional approach to regulating *when* disclosure must take place under *Brady*—which is far too tolerant of prosecutorial footdragging—derives from the materiality requirement. *See supra* note 131 and accompanying text.

280 *See supra* notes 142–47 and accompanying text.

281 *See supra* notes 153–75 and accompanying text.

282 I do not mean to suggest that prospective indigent defense litigation would suddenly become smooth sailing if prejudice were removed from the equation. Structural reform litigation in this domain—as in other areas of law—can flop for a variety of reasons, some of which have little if anything to do with prejudice doctrine. *See supra* note 154 and accompanying text. Yet some systemic Sixth Amendment claims can and do succeed even under current law, *see supra* note 155 and accompanying text, so it is worthwhile to think through how prejudice rules affect the viability of such claims.

283 *See supra* notes 275–76 and accompanying text. That said, the first part of my proposal would not leave appellate and postconviction review wholly unchanged. One implication worth noting has

this as a weakness of my proposal—the first part of the proposal, anyway. The academic literature is sharply critical of *Brady*'s materiality requirement[284] and *Strickland*'s prejudice prong[285] for setting an unreasonably high bar for reversal. Recasting prejudice as a remedial issue would not address that concern.[286]

The concern is one I share, and would address—if I had my way—through the second component of my proposal (discussed in the next Section), which involves overhauling the existing doctrinal tests for prejudice.[287] But to the extent courts are not prepared to accept that part of the proposal, I am inclined not to let the perfect be the enemy of the good. Recall that, at least with respect to *Brady* and effective assistance of counsel, courts embraced outcome-centric, right-restricting prejudice rules largely in order to shield the finality of criminal judgments against perceivedly excessive appellate and postconviction litigation.[288] Any attempt to make defense-friendly adjustments to those rules would arguably run counter to precedent[289] while also inviting the familiar objection that reversing a conviction or sentence is an inappropriate response to errors that likely had no effect on the result.[290] So from a strategic standpoint, the main weakness of my first proposed reform—namely, that it does not alleviate the heavy burden that *Brady* and *Strickland* impose on appellants and postconviction petitioners—is simultaneously a source of strength. Even courts that would reject out of hand the idea of lowering the threshold for appellate

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to do with cumulative prejudice analysis. Although it is clear that courts should collectively evaluate the materiality of multiple items of suppressed evidence under *Brady*, or the prejudice resulting from multiple attorney mistakes under *Strickland*, courts are reluctant to aggregate prejudice when faced with multiple claims that cut across these and other doctrinal boundaries—say, for example, when a defendant asserts that *Brady*, *Strickland*, and other legal rules were each violated at the trial court level. *See* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1318-22 (2017). Why are courts skittish about cumulating prejudice in these situations? Because no constitutional error occurs absent prejudice under the conventional interpretation of *Brady* and *Strickland*, and "[m]eritless claims . . . cannot be cumulated, regardless of the total number raised." Westley v. Johnson, 83 F.3d 714, 726 (5th Cir. 1996). By establishing that error occurs whenever the government suppresses favorable evidence or defense counsel furnishes deficient representation, my proposal would enable joint assessment of prejudice for all such errors—even if each error, viewed in isolation, was not prejudicial.

284 *See, e.g.*, Gershman, *supra* note 12, at 711-15.

285 *See generally* William S. Geimer, *A Decade of* Strickland*'s Tin Horn*, 4 WM. & MARY BILL RTS. J. 91 (1995).

286 Moreover, if courts were to embrace the first component of my proposal (moving prejudice from rights to remedies) without the second (redefining prejudice), there is a danger that *Brady*'s and *Strickland*'s prosecution-friendly test for prejudice, once it is firmly ensconced in the law of remedies, might compete against and, in time, erode the (relatively) defense-friendly *Chapman* harmless error rule. *See supra* note 28 (discussing *Chapman*). In my view, this risk—though real—is a price worth paying to liberate rights as central to fairness as *Brady* and effective assistance of counsel from right-restricting prejudice rules and the problems they engender.

287 *See infra* Section III.B.

288 *See supra* Section I.C.

289 *See supra* subsections I.B.1–I.B.2.

290 *See, e.g.*, United States v. Mechanik, 475 U.S. 66, 72-73 (1986).

and postconviction relief might nevertheless be willing to confine *Brady*'s and *Strickland*'s prejudice requirements to those remedial settings.

Indeed, many lower courts have already begun heading in this direction, joined in some jurisdictions by legislatures and other rulemaking bodies. With respect to *Brady*, some courts have held that due process obligates the government to disclose evidence that favors the defense irrespective of materiality, reasoning—to quote one federal district court opinion—that materiality is "unknown and unknowable before trial begins" and thus is best understood as "a standard articulated in the post-conviction context for appellate review."[291] And other jurisdictions, though not requiring this as a matter of *constitutional* law, have nevertheless done so through *nonconstitutional* mechanisms such as statutes, court rules, and professional ethics standards.[292] With respect to effective assistance of counsel, several courts have concluded that *Strickland*'s prejudice prong is inapplicable to prospective Sixth Amendment claims: "violations of the right to counsel can occur in many different ways," according to a recent state supreme court decision, and "[o]nly the remedy of a new trial requires a showing of prejudice."[293] Some courts have reached the same conclusion as a matter of state constitutional law,[294] though not without simultaneously doing so based on the Sixth Amendment.[295] The time is ripe, it seems, to reshape *Brady*, effective assistance, and possibly other prejudice-based rights—whether through constitutional reform or comparable nonconstitutional measures—by moving prejudice from rights to remedies.

### B. *Redefining Prejudice*

The second part of my proposal calls for redefining what prejudice means for purposes of *Brady*, effective assistance of counsel, and potentially other

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291 United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005); *see also supra* notes 121–26 and accompanying text.

292 *See supra* notes 132–33 and accompanying text.

293 Kuren v. Luzerne County, 146 A.3d 715, 743 (Pa. 2016); *see also supra* note 155 and accompanying text.

294 *See* Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751 (2010) (examining indigent defense litigation under state law, though without discussing the role of prejudice).

295 *See, e.g.*, *Kuren*, 146 A.3d at 732 n.6 (stating that the scope of the right to counsel under the Pennsylvania Constitution is "coextensive" with that of the Sixth Amendment); *see also* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1470-71 (1999) (noting that while "[s]tate courts are free to interpret rights provided by their own state constitutions (as the right to counsel invariably is) differently than the Supreme Court's interpretations of federal constitutional rights," they "almost uniformly have adopted the *Strickland* standard" with the exception of Hawaii).

prejudice-based rights. Although there are many possible ways to go about this, the approach I defend here would abandon the prevailing outcome-centric conception of prejudice embedded in current doctrine, and replace it with a non-outcome-centric framework that I call *contextual harmless error review*.[296]

This prescription grows out of a previous article in which I sketched a "contextual approach to harmless error review" for use in connection with non-prejudice-based rights.[297] In that piece, I criticized the dominant method of harmless error review on the ground that it rests on a "monistic and result-based conception of harm" that is "misaligned with the eclectic normative objectives of criminal procedure."[298] The alternative I proposed, contextual harmless error review, "involves two steps."[299] A court "would begin by identifying the interest (or range of interests) protected by whichever procedural rule was infringed."[300] It would then "examine whether the error harmed the interests identified in the first step of the analysis to a degree substantial enough to justify reversal."[301] Contextual harmless error review, I

296 One redefinitional strategy that many scholars have embraced is to replace *Brady*'s materiality requirement or *Strickland*'s prejudice prong with "traditional harmless error review," which is somewhat more defense-friendly (especially on direct appeal, and to a lesser extent in postconviction review proceedings) than the *Brady*/*Strickland* standard. See, *e.g.*, Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 518 (2009) (proposing this with respect to *Brady*); Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 41-49 (2009) (same, but with respect to *Strickland*); *cf. supra* note 28 (discussing the harmless error doctrine as it relates to constitutional errors). While I certainly prefer what these scholars propose over the doctrinal status quo, I doubt that switching from one outcome-centric prejudice rule to another would substantially disrupt the way reviewing courts approach the task. I am persuaded that a paradigm shift—a shift, that is, away from defining prejudice in outcome-centric terms—is needed.

297 *See* Murray, *supra* note 16, at 1810-23.

298 *Id.* at 1813.

299 *Id.* at 1795.

300 *Id.* The relevant set of interests identified by the first step of the analysis "will often change from case to case for the simple reason that the normative priorities of criminal procedure likewise vary a great deal from one rule to the next." *Id.* at 1811; *see also id.* at 1795 (noting that criminal procedure's "ethical vision . . . encompasses a diverse array of 'non-truth-furthering' interests—interests that include providing defendants with space for autonomous decisionmaking, enforcing compliance with nondiscrimination norms, and making transparent the inner workings of criminal justice—in addition to 'truth-furthering' objectives" (quoting, respectively, Stacy & Dayton, *supra* note 100, at 94; Cover & Aleinikoff, *supra* note 176, at 1092) (footnotes omitted)).

301 *Id.* at 1791. To illustrate how this two-step approach works, I applied it to a hypothetical death penalty trial, loosely derived from an actual case, involving homophobic remarks made by a prosecutor during the closing argument of the trial's penalty phase. *See id.* at 1817-20. As to step one of the analysis, identifying the relevant legally protected interests, I noted that the procedural rules the prosecutor violated aim not only to prevent unfair outcomes resulting from biased decisionmaking, but also to root out discrimination from the criminal process irrespective of a particular defendant's culpability. *Id.* at 1817-18. Regarding step two, balancing, I concluded that "the prosecutor's bigoted remarks . . . harmed [antidiscrimination] interests to a degree that warrants reversal of [the defendant's] death sentences"—even assuming that "the prosecution's case supporting a death sentence was so overwhelming that the jury assuredly would have rendered the same verdict absent the error." *Id.* at 1818-19.

argued, would better equip appellate and postconviction courts to vindicate "the full range of interests" that criminal procedure aspires to protect, not just the narrower set of interests privileged by result-based harmless error review.[302]

My prior work, which examined how to improve harmless error review in relation to *non-prejudice-based rights*, did not consider whether a similar strategy should be employed in relation to prejudice-based rights like *Brady* and effective assistance of counsel. I believe that it should. As explained in Part II, governmental suppression of evidence and deficient representation by defense counsel can both cause harm to an array of private and public interests—such as autonomy, equal justice for rich and poor, transparency, and separation of powers—even when the risk of prejudice to the outcome is slim to none.[303] The *Brady/Strickland* test for prejudice blinds courts to these forms of harm by directing them to focus exclusively on whether evidence suppression or deficient representation affected the outcome.[304] Contextual harmless error review would remedy that oversight, since it would "assess harm in relation to the constellation of interests served by the particular procedural rule that was infringed"—as relevant here, *Brady* or effective assistance of counsel—"and would not, as under existing law, automatically confine the [prejudice] inquiry to estimating the error's effect on the outcome."[305]

To better appreciate how contextual harmless error review would reshape appellate and postconviction courts' analysis of *Brady* and *Strickland* claims, consider the following hypothetical. (Assume for purposes of the hypothetical that my first proposal—moving prejudice from rights to remedies—has already been adopted by the relevant court.) An attempted robbery transpired in broad daylight, and four witnesses, including the victim, each managed to get a good look at the would-be robber.[306] The police promptly responded to the scene, and the three non-victim witnesses, who had no discernible motive to lie, gave consistent, independent, and detailed descriptions of the perpetrator.[307] Their descriptions matched the defendant, whom the police stopped just a few blocks away minutes after the incident. By contrast, the victim's initial description of the perpetrator conflicted in some respects with

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302 *Id.* at 1795.

303 *See supra* subsection II.B.2.

304 *See id.*

305 Murray, *supra* note 16, at 1791.

306 The perpetrator reportedly grabbed the victim by the shirt and ordered him to empty his pockets. But the victim had left his wallet and phone at home that day, so he did not have anything in his pockets. Once the perpetrator realized this, he took off running with nothing to show for his efforts.

307 They each described the perpetrator as a teenage black male of roughly average weight and height with a light complexion who was wearing a short-sleeve shirt with the local baseball team's logo, denim jeans, a belt, and brown shoes.

the description furnished by the non-victim witnesses.[308] But the victim's description evolved a bit in his second police report the following day, bringing his version into agreement with the description supplied by the other witnesses.[309] All four witnesses identified the defendant in a showup identification procedure. The government never disclosed the victim's first police report to the defense, thereby violating *Brady*, to the extent the *Brady* right is not limited by prejudice, as we are currently assuming.[310] The defendant went to trial, though his lawyer put on no defense beyond generically relying on the government's burden to prove guilt beyond a reasonable doubt. The jury found the defendant guilty.

After losing his direct appeal, the defendant sought postconviction relief in state court on two grounds. First, he claimed that his conviction should be overturned under *Brady* due to the government's suppression of the victim's initial description—which had fortuitously been uncovered through post-trial news reporting about his case. Second, he alleged that state-appointed trial counsel was ineffective insofar as counsel disregarded his expressed desire to testify[311] and did not even bother interviewing the defendant or his mother to investigate a potential alibi defense.[312] Following an evidentiary hearing, the postconviction court credited the defendant's allegation (corroborated by trial counsel) that counsel had kept him off the stand contrary to his wishes

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308 During his first interview with the police, the victim reported that the perpetrator was wearing a long-sleeve shirt with the baseball team's logo—as opposed to a short-sleeve shirt—and that he did not appear to have on a belt. Otherwise, the victim's description aligned with that of the non-victim witnesses.

309 The victim also gave the police an explanation for his shifting recollection of the perpetrator's physical profile. He explained that in the immediate aftermath of the incident, he had been unable to think straight or accurately recall what the perpetrator looked like due to the stress he was going through; but once he had a chance to cool down and reflect, his memory improved, enabling him to report that the perpetrator's shirt had short sleeves and that he was wearing a belt. One cannot help but wonder, though, whether the victim's independent recollection of the perpetrator's appearance had been tainted when he saw the defendant wearing short sleeves and a belt during the police identification procedure.

310 In light of our present assumption that prejudice has been removed from the definition of the *Brady* right, violations occur whenever the government suppresses evidence that is even minimally favorable to the defense. The victim's initial description undoubtedly satisfies that test, since it provides (1) affirmative evidence of innocence, albeit weak evidence, because the description did not match the defendant in some respects, and (2) impeachment evidence insofar as it contradicts the victim's second police report and the descriptions reported by the other witnesses.

311 *Cf.* McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018) ("The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. . . . Some decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, *testify in one's own behalf*, and forgo an appeal." (emphasis added)). *But see id.* at 1510-11 ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence . . . to McCoy's claim.").

312 *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 534 (2003) (finding that counsel's penalty phase investigation was deficient where "incomplete investigation was the result of inattention, not reasoned strategic judgment").

and had failed to look into his alibi. Yet the court concluded that even with the *Brady* evidence suppressed by the government and the testimony the defendant and his mother might have offered at trial, there was no realistic chance that the jury would have returned a different verdict.[313] The government's evidence of guilt was far too strong, the court determined, and the defendant's alibi too convoluted for the new information to plausibly affect the outcome.[314]

Under current law—indeed, even current law as modified by the first part of my proposal (moving rights to remedies)—the postconviction court's findings would doom the defendant's request for a postconviction remedy. To establish prejudice in the context of a petition for postconviction relief, *Brady* and *Strickland* both require the defendant to show a "reasonable probability" that the outcome would have been different had the alleged error not occurred.[315] The strength of the government's proof, coupled with the fragility of the defendant's alibi, would make the defendant unable to satisfy this outcome-centric standard.

If, by contrast, the postconviction court were to apply contextual harmless error review in lieu of the conventional "reasonable probability" test for prejudice, the defendant's prospects for securing relief would grow far brighter. That is because the court would then have to consider not just whether the outcome was affected, but also whether the *Brady* violation or ineffective assistance of counsel substantially harmed—to a degree warranting a new trial—any other interests that the Constitution's discovery and counsel safeguards are supposed to advance.[316] Here, the defendant could forcefully argue that the errors in his case gravely impaired a legally protected autonomy

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313 Our hypothetical judge is apparently in good company. Two scholars who examined case law on the constitutional right to testify in 2013 determined that *Strickland*'s prejudice prong had "rendered [the right] a nullity" since "the defendant loses almost every time." Daniel J. Capra & Joseph Tartakovsky, *Why* Strickland *Is the Wrong Test for Violations of the Right to Testify*, 70 WASH. & LEE L. REV. 95, 112-13 (2013); *see also id.* at 113-14 ("The court usually finds some or all of the following: the accused would not have been found credible; his testimony would have been cumulative; he would have been exposed to impeachment with prior convictions; the evidence against him was 'overwhelming'; or his testimony was weak and would not have helped." (footnotes omitted)).

314 As proffered at the evidentiary hearing, the defendant would have testified at trial that around the time of the incident he had been visiting a group of friends who often hung out in the area and that, when the police stopped him (unaccompanied by any friends) minutes after the incident, he had finished the visit and was heading home. The defendant's mother would have testified that, hours before this, the defendant had said he was going out for awhile to see his pals. Neither the defendant nor his mother, however, could supply real names (as opposed to aliases) or addresses for any of the purported friends, and the defendant did not call any of them to testify at the evidentiary hearing.

315 *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); Strickland v. Washington, 466 U.S. 668, 694 (1984); *see generally supra* subsections I.B.1–I.B.2.

316 *See supra* notes 297–305 and accompanying text.

interest by silencing him at trial and depriving him of the opportunity to articulate any defense theory beyond abstract platitudes about the government's burden of proof.[317] In my judgment, that harm would likely justify relief—if, at least, the defendant was diligent in seeking postconviction review in a timely fashion after discovering the factual basis for his claims, maximizing the odds that the government could relocate its witnesses and potentially retry him.[318]

I recognize that some observers might reach a conclusion different from my own on these facts by assigning less weight to the defendant's autonomy interest or heavier weight to the social cost of a new trial. For doctrinal tests that endeavor to strike a delicate balance among competing interests, as does contextual harmless error review, good-faith disagreements inevitably come with the territory.[319] We should not be alarmed by this. Whatever the true value of autonomy might be in the hypothetical I have constructed, or in real cases that are similar to it, the answer surely is not zero—not by a longshot. Yet zero is precisely the value that the outcome-centric prejudice paradigm ascribes to autonomy and criminal procedure's other non-truth-furthering interests, insofar as it excludes them entirely from the governing remedial framework. So while contextual harmless error review would not produce clear and uncontroversial answers in close cases, it would at least equip courts to ask the right questions.

## CONCLUSION

There is an understandable impulse, for many scholars and judges who study constitutional doctrine, to conflate the categories of right and remedy, treating any expansion or contraction in one domain as tantamount to expansion or contraction of the other. With regard to this Article's core topic,

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317 *See supra* notes 233–36, 247–49 and accompanying text (suggesting that *Brady* and the right to effective assistance of counsel should be understood as advancing autonomy as well as reliability).

318 *Cf.* O'Neal v. McAninch, 513 U.S. 432, 443 (1995) (stating that, although the government has a "legitimate and important" interest in avoiding retrial for individuals whose convictions were in fact unaffected by errors, this interest "is somewhat diminished . . . if one assumes . . . that retrial will often (or even sometimes) lead to reconviction"). Most modern schemes for postconviction review have a distinct set of rules—separate from the harmless error doctrine—that regulate when claims must be filed. *See, e.g.*, 28 U.S.C. § 2244(d) (2018) (erecting a one-year statute of limitations with varying triggers to start the clock).

319 *See* Epps, *supra* note 13, at 2158 (criticizing my proposed contextual approach to harmless error review as "indeterminate" because "[t]here is without doubt significant disagreement—both within the judiciary and without—about the social costs of reversal and the value of particular constitutional rights"). Relatedly, Brandon Garrett has suggested that contextual harmless error review might make appellate and postconviction remedial decisionmaking even more erratic than it currently is by "liberat[ing] judges to further rely on their own value judgments." Brandon Garrett, *Patterns of Error*, 130 HARV. L. REV. F. 287, 288 (2017).

prejudice-based rights, commentators often suggest that there is little or no meaningful difference between folding prejudice into the definition of a right versus employing prejudice to limit access to appellate or postconviction remedies for violations of the right.[320] In numerous other doctrinal contexts—ranging from the Fourth Amendment exclusionary rule and qualified immunity to habeas and *Bivens*—critics charge that courts have profoundly yet surreptitiously diminished the scope of constitutional rights under the guise of adjusting remedial law.[321] And as a matter of constitutional theory, Daryl Levinson and other scholars of a pragmatist bent[322] have argued that "the cash value of any right is a function of the remedial consequences attached to its violation"[323] and thus that there is no real point in trying to "sharply separat[e] the realm of rights from the realm of remedies."[324]

This Article suggests, however, that in at least some areas of the law, there are compelling reasons—*pragmatic* reasons—to reinforce, not dissolve, the conceptual boundary between rights and remedies. As I have shown, remedy-restricting prejudice rules in constitutional criminal procedure pose fewer risks to the vitality of rights than do right-restricting prejudice rules since the former, unlike the latter, enable courts to ration the availability of certain remedies while leaving other mechanisms for implementing rights—alternative judicial remedies as well as efforts by nonjudicial actors—intact. This insight yields a simple yet powerful doctrinal prescription for some of criminal procedure's most important rights, such as *Brady* and effective assistance of counsel: take prejudice out of the definition of these rights, and recast it as a remedial question entrusted primarily to appellate and postconviction courts, in order to strengthen constitutional implementation at the trial court level.

But this Article also carries a broader lesson for constitutional theory, in addition to its more immediate implications for criminal procedure reform. The lesson, succinctly stated, is that constitutional rights are not reducible to judicial remedies, and certainly not to any single remedy (such as appellate

320 *See supra* notes 110–11 and accompanying text.

321 A recent article by Leah Litman develops an especially forceful variant of this argument that emphasizes the *collective* impact of remedial backsliding in *all* of these domains on the de facto scope of constitutional rights. *See* Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1500 (2018) ("When almost every adjudication of a right is refracted through the same, demanding remedial standard, the remedial system effectively narrows the contours of the underlying rights themselves.").

322 Pragmatist constitutional theory comes in many flavors. The sort of pragmatism I am referencing here posits that "remedies define . . . right[s]," thereby "equating rights exclusively with the rights that courts will enforce[] . . . ." Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1315 (2006).

323 Levinson, *supra* note 273 at 874.

324 *Id.* at 857.

reversal). It can matter a great deal whether courts, when responding to concerns tied to particular remedies (such as the cost of awarding new trials), choose to restrict *those* remedies or, instead, to reshape the underlying right. Pragmatist constitutional theory downplays this practically impactful choice at its peril.

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